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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 692

JAMES T. SPENCER, ADMINISTRATOR OF THE ESTATE OF JACKSON BARNETT,

Petitioner,

vs.

GYPSY OIL COMPANY, A CORPORATION; GULF OIL COMPANY, A CORPORATION; F. A. GILLESPIE, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 692

JAMES T. SPENCER, Administrator of the Estate of Jackson Barnett, Deceased,

Petitioner,

vs.

GYPSY OIL COMPANY, a Corporation; GULF OIL COMPANY, a Corporation; F. A. GILLESPIE; F. A. GILLESPIE AND SONS COMPANY, a Corporation; MID-CONTINENT PETROLEUM CORPORATION, a Corporation; MANNFORD OIL AND GAS COMPANY, a Corporation; CUSHING GASOLINE COMPANY, a Corporation; SOUTH-WEST OIL COMPANY, a Corporation; JESSE BARTLETT, Administrator of the Estate of H. U. Bartlett, Deceased,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petition of James T. Spencer, administrator of the estate of Jackson Barnett, deceased, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals of the Tenth Circuit entered in the above-entitled cause May 22, 1944.

Opinion Below

The opinion of the Circuit Court of Appeals is reported in 142 Fed. (2) 935 (R. 823-827).

The opinion of the U. S. District Court is in the record (R. 616-622).

A rehearing was denied June 24, 1944 (R. 863).

The time for filing this petition and brief was on August 30, 1944, by an order of Mr. Justice Black extended to and including October 20, 1944 (R. 865). The further time for filing this petition and brief was on October 11th, 1944, by an order of Mr. Justice Rutledge extended to and including November 20, 1944 (R. 865).

Jurisdiction

The opinion of the Circuit Court of Appeals was filed May 22, 1944 (R. 823-827). Judgment was entered May 22, 1944 (R. 828).

The jurisdiction of this court is invoked under the provisions of Sec. 240 of the Judicial Code as amended by the Act of March 3, 1891, c. 517; Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; Sec. 347, Title 28, U. S. C.

Questions Presented

1. Whether the final decree entered in consolidated cause 216 equity in the U. S. District Court on July 11, 1929 (R. 105-107) was, in law and in fact, a consent decree solely based upon a compromise and consent agreement (R. 769-772, 786), or, was it, as held by the Circuit Court of Appeals, a judicial determination of the issues involved in the case in which it was entered.

2. Whether, by the provisions of Sec. 2 of the Act of Congress, approved May 27, 1908 (35 Stat. 312), a U. S.

District Court having jurisdiction of the parties and the subject matter of an action brought by the next friend and guardian *ad litem* on behalf of a restricted, mentally incompetent Indian of the Creek Nation for possession of lands allotted to said Indian, and for cancellation of an oil, gas and mining lease, concededly void by reason of the lack of mental capacity of said Indian to make the same, and for damages for the oil and gas removed by the adversaries of said Indian in the litigation, said U. S. District Court has jurisdiction to enter a compromise consent judgment against said Indian based upon a compromise and consent agreement, even though said compromise agreement is approved by the Secretary of the Interior and by the Attorney General of the United States, and no trial or judicial determination has been had in said court to determine the rights of said mentally incompetent and restricted Indian in his said allotted lands, oil and gas rights, the effect of which consent judgment was to divest said Indian of the title to oil and gas rights in his said allotted lands and to vest the title thereto in his adversaries, and to dismiss with prejudice the action of said Indian and to cancel his claim for the value of the oil and gas removed by his adversaries in said action, and where the Circuit Court of Appeals conceded in its opinion that said Indian was mentally incompetent and could not execute a valid oil and gas lease, and further, that the District Court erred in deciding that the ratification of the oil and gas lease by the representatives of said Indian and its approval by the Attorney General and the Secretary of the Interior gave it validity.

3. Where the guardian *ad litem* and the next friend of a mentally incompetent, restricted Indian consented to a compromise agreement, without more, which divested their ward of title to valuable oil and gas rights and vested title thereto in his adversaries, in litigation; whether the said

guardian *ad litem* and the next friend were vested with lawful authority to bind the mentally incompetent Indian to the terms and conditions of the compromise agreement as set forth in the record of this case (R. 769, 772-785) which was the sole basis, without judicial investigation or determination, for the entry of a final decree and judgment against said mentally incompetent, restricted Indian, assuming to ratify and give validity to the concededly void oil and gas lease of March 5, 1912 (R. 39-46), and to quiet the title to said oil and gas under said restricted lands of said mentally incompetent Indian in respondents, herein, and to dismiss his action with prejudice, although such compromise agreement had, prior to the entry of said final decree, been approved by the Secretary of the Interior and by the Attorney General of the United States.

Statutes and Constitutional Provisions Involved

Sec. 2, Act of Congress, approved May 27, 1908 (35 Stat. 312), providing the exclusive manner under which a restricted member of the Creek Nation of the Five Civilized Tribes and a mentally incompetent can execute a valid oil and gas lease upon his lands.[1]

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[1] "Sec 2. That all lands, other than homesteads, allotted to members of the Five Civilized Tribes from which restrictions have not been removed, may be leased by the allottee, if an adult, or by guardian or curator under the order of the proper probate court, if a minor or incompetent, for a period not to exceed five years without the privilege of renewal: Provided, that a lease of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made with the approval of the Secretary of the Interior, and not otherwise; and provided, further that the jurisdiction of the probate court of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions and the term "minor" or "minors", as used in this act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Act of March 3, 1901 (31 Stat. 1447) making all Indians who are members of the Five Civilized Tribes citizens of the United States.

The Fifth Amendment to the Constitution of the United States, providing for the due process clause.

Revised Statutes of Oklahoma 1941, Title 12, Sec. 279 (1931 Stat., Sec. 213), providing that a guardian *ad litem* shall plead all defenses in behalf of his ward.[2]

Sec. 4981 Oklahoma Statutes for 1921, defining the capacity of persons incompetent to make contracts.[3]

Sec. 1449 Oklahoma Statutes for 1921.[4]

Sec. 725, Title 28, U. S. C.[5]

Sec. 6570 Revised Laws of Okla. 1910.[6]

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2 "The guardian of an infant or a person of unsound mind, or attorney for a person in prison, shall deny, in the answer, all material allegations of the petition prejudicial to such defendant."

3 "* * * A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him, necessary to his support, or the support of his family." See *Hains* v. *International Land Co.*, 89 Okla. 163; *Long* v. *Anderson*, 17 Okla. 95; *Norris* v. *Dagley*, 64 Okla. 171.

4 "When it is represented to the county court upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the supposed insane or incompetent person, of the time and place of the hearing the case, not less than five days before the time so appointed, and such person if able to attend, must be produced before him on the hearing."

5 "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

6 "6570. *Guardian for Non-resident Ward.* When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this state, and has estate therein, any friend of such person or anyone interested in his estate, in expectancy or otherwise, may apply to the county judge of any county in which there is any estate of such absent person, for the appointment of a guardian; and if after notice given to all interested, in such manner as the judge orders, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed."

Statement

This action was commenced in the U. S. District Court for the Northern District of Oklahoma on November 2, 1938, by petitioner against respondents, being No. 39 Civil (R. 6-39) and is an action in the nature of an ancillary suit to vacate and void what is termed a consent and final decree entered on July 11, 1929, in said Court in cause No. 216 Equity Consolidated, which consolidated cause consisted of a suit instituted by Jackson Barnett, a mentally incompetent, restricted Indian of the Creek Nation by Fred T. Hildt, his next friend, against Gypsy Oil Company and others, respondents herein, and cause No. 260 Equity being an action instituted by the Gypsy Oil Company and others, respondents herein, against Jackson Barnett, defendant, a copy of which final decree above referred to is in the record (R. 105-107); and for a judgment and order of said District Court finding and adjudging void and unauthorized a compromise agreement entered into by and between the next friend for Jackson Barnett, incompetent, in cause No. 216 Equity, and C. B. Stuart, Guardian *ad litem* for said Jackson Barnett, defendant, named in cause No. 260 Equity, on the one hand and the said Gypsy Oil Company and others, being the respondents herein, on the other hand, whereby and wherein the said next friend and the guardian *ad litem* attempted to compromise and settle, release and discharge and dismiss the causes of action set up by said next friend and guardian *ad litem* in said consolidated action on behalf of said mentally incompetent Indian, a copy of said compromise agreement is in the record (R. 769, 782, 783, 784, 785). And for further relief in said cause to have the administrator of the estate of Jackson Barnett, deceased, substituted in lieu of said next friend and said guardian *ad litem* and for the docketing of said consolidated action upon the trial docket for said District Court, that they might

be tried upon their merits, and a just judgment entered therein.

That Jackson Barnett was a full-blood restricted member of the Creek Tribe of Indians, to whom an allotment of 160 acres of land had been conveyed, which lands were restricted against alienation and that said Barnett was so mentally incompetent that he could not understand the nature and value of his lands nor the nature and effect of an oil and gas mining lease thereon. (R. 758-767). That said Indian, at the time of filing cause No. 216 Equity and at the time of intervention of the United States, was about sixty years of age, and was then and at all times thereafter domiciled in Muskogee County, Oklahoma. (R. 793-796).

That on March 5, 1912, Barnett placed his thumbprint signature to an oil and gas mining lease covering said lands. The lease was in the form provided by the Secretary of the Interior in such cases and providing for a royalty of one-eighth of all oil and gas produced from said lands under such lease. (R. 39-49).

That on April 29, 1929, one Carl J. O'Hornett was by the County Court of Okmulgee County appointed guardian for said Indian. That the day following said appointment said guardian executed to certain oil operators, Cornelius and Gooch, an oil and gas mining lease on a similar form covering all of said lands, which lease was approved by the County Court. That an appeal was duly taken from the order appointing said O'Hornett as guardian to the District Court of Okmulgee County and that on the 24th day of June 1912, said Court heard said appeal cause and rendered judgment therein, finding and adjudging said appointment void and that said County Court was without jurisdiction to make the same. (See Record 697-698).

That said decision was never appealed and became final. On August 17, 1912, an offset producing oil well was drilled

close to the Barnett land, increasing the bonus value of a valid oil and gas lease thereon to $500.00 per acre. (R. 660-661).

That five days later and on August 22, 1912, said O'Hornett with full knowledge that his appointment was void, and conspiring with the lessee, Bartlett, under the lease of March 5, 1912, and, with Cornelius and Gooch, pretended assignees, under the thumbprint lease of Barnett, and, for the purpose of obtaining possession under such void lease for a nominal sum, fraudulently pretended to adopt said lease as "legal guardian of said Jackson Barnett, incompetent," Respondent's Bill in Equity 260, Par. 10 (R. 61-64). See Lease March 5, 1912 (R. 39-49). This was done by inserting the name of O'Hornett as guardian, in the thumbprinted instrument by Jackson Barnett, on March 5, 1912. This instrument so materially altered as to destroy it as the separate lease of Barnett, was thereafter presented to the Secretary of the Interior for approval as a lease executed by a duly appointed guardian for Jackson Barnett, a copy of which said lease originally thumb-marked by Barnett on March 5, 1912, and as it appeared after the alterations thereof were made and the signature of said pretended guardian had been affixed thereto as the legal guardian of Jackson Barnett, and had been approved by the Secretary of the Interior on September 13, 1912, appears in the record (R. 39-49). Respondents here now concede that, as a lease executed by O'Hornett as guardian, same was wholly void, and are seeking now to sustain the same instrument notwithstanding its alteration as the individual lease of Barnett, and one which, under the concession of the Circuit Court of Appeals, in its opinion, was held equally void. See opinion Circuit Court of Appeals, 142 F. 935, 936, 937, *supra* (In re appeal of Jackson Barnett, 122 Okla. 160). That Bartlett and his assignees, respondents

herein, went into possession under this same lease, and have occupied said lands ever since (R. 776). In 1926, the question of the validity of O'Hornett's appointment as guardian was brought before the Supreme Court of Oklahoma; that Court again declared the said appointment totally void. In re Jackson Barnett, 122 Okla. 160, *supra*.

That soon after the decision of the Supreme Court of Oklahoma the action known as 216 Equity herein was begun by Fred T. Hildt as next friend of Jackson Barnett v. Gypsy Oil Company and others seeking to cancel said oil and gas lease on the ground that the said Barnett was mentally incompetent at the time of its execution and that said lease was void and sought to recover the value of the oil and gas which had been wrongfully removed therefrom. See Amended Bill in Equity No. 216 (R. 50-55). That respondents entered their appearance in said action and, in addition thereto, filed a separate action against Barnett in which they asserted their title to the leasehold rights in the oil and gas, and sought to quiet their title thereto and to dismiss said Barnett's action. See Separate Answer and Counter-Claim of respondent in 216 Equity (R. 129-153). The guardian *ad litem* for Barnett in said action filed a counter-claim in 260 Equity, which he asserted substantially was set up in 216 Equity, alleging that Barnett's lease was wholly void because of his mental incapacity to execute the same, and that the said oil companies, respondents herein, had wrongfully removed oil and gas of the value of more than $15,000,000, and asked for judgment therefor. See Counter-Claim guardian *ad litem* (R. 77-90). The United States was notified of the pendency of both said actions in accordance with the Act of April 12, 1926, Sec. 3 (44 Stat. 240) and filed its "answer" in each said action and, instead of supporting the claims of the incompetent Indian and protecting his estate, as became its duty as

guardian, the United States filed its "answer" admitting Barnett's mental incompetency to execute the lease and alleging further that, by reason of the long occupancy of said land by the oil companies, respondents herein, and the development of oil and the payment of benefits in the form of royalties, that it was for the best interest of Barnett that his actions therein be dismissed with prejudice, and that said lease be validated and the title to the oil and gas rights be quieted in said respondents herein. See Answer of United States in No. 216 Equity (R. 91-99) and in 260 Equity. See same Answer in 216 Equity.

That said causes, after being at issue, were consolidated as No. 216 Equity Consolidated and set for trial several times but never tried (R. 749, 750, 751), but the said guardian *ad litem* and the next friend and the respondents herein entered into a compromise settlement of said litigation and executed a compromise agreement by the terms of which, for a consideration of $35,000.00, of which $20,000.00 went to the Secretary of the Interior for Jackson Barnett and the remainder as fees to the guardian *ad litem* (See compromise agreement (R. 769-772-786). See Order of Court (R. 102-104), it was agreed that the void lease under which said respondents claimed "shall be and is hereby confirmed, ratified and adopted as a legal and binding departmental oil and gas mining lease on said lands from and since the date of its execution and approval by the Secretary of the Interior September 13, 1912," and that Barnett's suits should be dismissed with prejudice and that the title and ownership of the oil and gas rights in said land be adjudged in respondents and their title therein quieted by a decree of said court, and making provision that Barnett and his heirs be perpetually enjoined from ever questioning their rights and ownership therein. A copy of which compromise agreement is set out in the record (R. 769-772-786).

Said compromise agreement purports to set forth certain facts and historical data pertaining to the history of said lease and the occupancy of said land and production of oil thereupon, but does not contain any statement showing the mental incompetency of Jackson Barnett at the time said oil and gas lease was thumbprinted by him nor at all times since, nor does it set forth any controlling fact involved in the issues of the lawsuit, but it does provide that a final decree shall be entered by the court therein, specifically setting forth the terms and provisions which said decree shall contain. That thereafter and on June 13, 1929, said compromise agreement was submitted to said court by the guardian *ad litem* upon a written application for its approval, a copy of which is shown in the record (R. 100-102). And that on said date, without any trial or hearing of any testimony or argument supporting or tending to support Barnett's causes of action, said court signed an order approving said compromise agreement, conditioned that the same before it become effective must be approved by the Secretary of the Interior and the Attorney General of the United States. A copy of said order is in the record (R. 102-104). Thereafter, said compromise agreement was approved by the Secretary of the Interior and the Attorney General of the United States (R. 771-772). Thereafter and to wit on July 11, 1929, without said cause having been set upon the docket of said Court for hearing, and without any trial or the introduction of any evidence, oral or written, or the presentation of any law or argument in support of the incompetent Indian's cause of action in said consolidated suit and upon presentation by the counsel for the respondents of the approved compromise agreement aforesaid and a decree based thereon prepared for the court's signature was submitted to the Judge of said Court and was by him signed, a copy of which final decree is set out in the record (R. 105-107). The identical relief granted and

awarded by the final judgment is that which the compromise agreement specifically stated should be granted in said decree and nothing else. Compare compromise agreement with final decree.

That Jackson Barnett died and petitioner herein was duly appointed administrator of his estate (R. 795-796). And brought this action to have the final judgment and consent decree declared void and beyond the jurisdiction of the court to enter it without a trial upon the merits and an adjudication of the controlling issues in said consolidated action praying that said decree be vacated and that the said consolidated action be set for trial and hearing upon the merits in regular course (R. 6-39). That issues were joined thereon by respondents (R. 344-373, 438-460, 421-437). On February 20, 1939, the United States, upon its own application, filed its petition in intervention in the case at Bar, alleging that said final decree was void and praying for its vacation and the setting of said consolidated cause upon its merits, and in every way supporting the administrator's action (R. 108-116). That thereafter on June 26, 1942, the United States, acting through the Department of Justice, procured an order permitting it to withdraw its intervening petition and appearance in said cause, without specifying any ground or reason therefor. An order was granted accordingly (R. 615-616). Thereafter, this cause proceeded to trial upon issues joined upon plaintiff's complaint, and on September 8, 1942, the court announced its decision and entered its findings of fact and conclusions of law (R. 616-621) wherein, among other things, said court found that:

> "The Court in consolidated cause No. 216 Equity had full jurisdiction of the parties and of the cause of action, and had full jurisdiction and authority to render the judgment therein and the particular judgment that it did render, and said judgment is valid on its face, and by the judgment rolls in said cause."

And as a conclusion of law held that the final decree in said cause was valid and no grounds existed for setting same aside (R. 621). A decree was entered dismissing plaintiff's complaint with prejudice (R. 621-622). Motion for new trial was filed and motion was denied January 8, 1943 (R. 623-633). Appeal was timely in the Circuit Court of Appeals for the Tenth Circuit and that court by its decision, expressed by Judge Walter A. Huxman, affirmed the judgment below. See footnote for pertinent portion of opinion.[7] Petition for rehearing was denied June 24, 1944 (R. 863).

The amount of the claim involved in the case at Bar exceeds the sum of $20,000,000.00 including interest under

[7] "* * * On June 13, 1929, all the parties, having agreed to a settlement of the consolidated cause, prepared a written compromise agreement. * * * The compromise settlement was approved by the guardian *ad litem* and by the next friend of Jackson Barnett. It was submitted to the court for approval by the guardian *ad litem* with the statement that it was for the best interest of Barnett and with the recommendation that it be approved by the court. It was approved in open court by the trial judge June 13, 1929, on condition, however, that it be approved by the Attorney General and the Secretary of the Interior of the U. S. It was approved by these two officers and on July 11, 1929, the cause came on for hearing for final judgment. Judgment was entered in open court approving the settlement and quieting appellees, title to the lease." * * * Appellant recognizes that to be successful he must get around the judgment in consolidated No. 216 Equity quieting appellee's title to the oil and gas lease. This he seeks to do on the ground that the judgment is void because it constituted a consent decree. It is argued that neither a legal guardian, a guardian *ad litem*, nor a next friend of an incompetent person can consent to a compromise judgment and that such a judgment is absolutely void. * * *

"* * * It is our opinion that the decree of the court was not a consent decree; that it was a judicial determination of the issues involved in the case in which it was entered, and is a valid and binding decree, and constitutes an effective bar to the prosecution of this case." * * * It may be conceded for the purposes of this opinion that Jackson Barnett was mentally incompetent and could therefore not execute a valid oil and gas lease. It may also be conceded for the same purpose that the court erred in consolidated Equity No. 216 in concluding that the ratification of the lease by the representatives of Barnett and its approval by the Attorney General and the Secretary of the Interior gave it validity. * * * 142 F. (2) 935, 936, 937, *supra*.

the provisions of Oklahoma law (Par. 27, Plaintiff's complaint No. 39 Civil R. 36).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In affirming the decree and judgment of U. S. District Court for the Northern District of Oklahoma, based upon the compromise agreement and consent of the guardian *ad litem* and next friend of the mentally incompetent, restricted Indian, without more, and without judicial investigation and determination.

2. In holding that the decree of the U. S. District Court based upon the compromise agreement and consent without more, and without judicial investigation and without judicial determination was not a consent decree, but that it was a judicial determination involved in the case in which it was entered.

3. And that the decree of the U. S. District Court is valid and binding on the mentally incompetent and restricted Indian and constituted an effective bar to the prosecution of this case.

4. The Circuit Court of Appeals erred in refusing and failing to reverse the decree of the U. S. District Court and holding that the decree based on the compromise agreement was void and without force and effect.

5. Said Court also erred in refusing to vacate and set aside the consent decree of July 11, 1944, entered in said consolidated action in the District Court and that said action be set for hearing upon the merits thereof after substituting the administrator of the estate of Jackson Barnett in lieu of the next friend and guardian *ad litem*.

Reasons for Granting the Writ

The decision of the Circuit Court of Appeals below that the decree entered by the District Court was not a consent decree based solely on a compromise agreement but that it was a judicial determination of the issues involved in the case and is a valid and binding decree as against the rights of the restricted, mentally incompetent Indian and constituted an effective bar to the prosecution of this case has decided an important question of local law of the State of Oklahoma in a way probably in direct conflict with well-settled applicable local decisions of the Supreme Court of the State of Oklahoma, and is in direct conflict with the case of *Tucker* v. *Leanord,* 144 Okla. 264, 291 Pac. 124; and other cases to the same point. See footnote.[8] In which cases the court there held, with reference to the effect of orders purporting to approve settlements made by guardians and representatives of restricted, incompetent Indians under agreements entered into for the purpose of avoiding judicial investigation and determination of the Indian's rights, that these orders are not and do not purport to be a determination of the rights of the plaintiff. They are, at best, only a conclusion of the court that it would be for the best interest to take the money rather than try the lawsuit.

The Oklahoma Supreme Court, after reviewing the authorities on this point, flatly held that the attempted action of the lower court (District Court of Oklahoma) was

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[8] *Griffin* v. *Galbraith*, 114 Okla. 208, 247 Pac. 339; *Title & Guaranty Surety Co.* v. *Foster, et al.*, 84 Okla. 291, 203 Pac. 231; *Harjo* v. *Johnston, et al.*, 187 Okla. 561, 104 Pac. (2) 985; *Lowery* v. *Richards*, 120 Okla. 261, 248 Pac. 622; *In re Sanders Estate*, 67 Okla. 3, 168 Pac. 197; *Bolling et al.* v. *Campbell*, 36 Okla. 671, 128 Pac. 1091; *Neal* v. *Travelers Inc. Co.*, 188 Okla. 131, 106 Pac. (2) 811; *Tidal Oil Co.* v. *Flannegan*, 87 Okla. 231, 237; *Colins Investment Co.* v. *Beard*, 46 Okla. 310; *Brewer* v. *Dodson*, 60 Okla. 81; *Bell* v. *Fitzpatrick*, 53 Okla. 574, 157 Pac. 334.

void, going on to say that the jurisdiction of the District Court of Creek County, Oklahoma, was limited to a determination of the issues presented by the pleadings in the case, and it was the duty of the lower court to render judgment for or against the plaintiff without regard to whether or not it was for the best interest of the plaintiff; as a matter of fact, the best interest of the plaintiff was not involved in that controversy, and, when the court was asked to approve a settlement made between the next friend of plaintiff (as in the case at Bar) and defendant, it was the duty of the court to decline to make any order with reference to the matter. The orders were beyond the jurisdiction of the court and were void.

The case of *Tucker* v. *Leonard, supra,* and companion cases cited in the footnote, is the well settled and consistent body of the law of the State of Oklahoma, which has been consistently followed before and since statehood regarding the disposition of property rights of restricted, incompetent Indians, and was declared to be the law by the Courts of the Territory of Oklahoma before statehood in the leading case of *Goodrum* v. *Buffalo,* 162 Fed. 817.

These decisions of the Supreme Court of the State of Oklahoma conform to and are in accord with the policy and law of the United States with reference to the property of the Indians.

The decision of the Circuit Court of Appeals is in direct conflict with the principles of law decided by this Court in *Kelly* v. *Town of Milan,* 127 U. S. 139 at 159, 160, 32 L. Ed. 77 and 8 S. Ct. 1101, in which this court held referring to and reviewing the decree of the lower court based on a compromise and consent agreement as in the case at Bar, this court in substance said: This was no adjudication by the court of the validity of the bonds on the submission to it as a judicial tribunal of the question of such validity. The declaration of the validity of the

bonds, contained in its decree, was made solely in pursuance of the consent to that effect contained in the agreement signed by the Mayor of the Town and an Officer of the New Orleans, St. Louis and Chicago Railroad Company. The act of the Mayor in signing the agreement could give no validity to the bonds if they had none at the time of the agreement being made. The want of authority to issue them extended to the want of authority to declare them valid. The Mayor had no such authority. The decree of the Court was based solely on the declaration of the Mayor, in the bill in Chancery, that the bonds were valid.

The adjudication in the decree can not, under the circumstances, be set up as a judicial determination of the validity of the bonds. This is not a case of the submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision by a person who had no right to bind the Town by such consent, because it gave life to invalid bonds and the authorities of the Town had no more power to do so than they had to issue the bonds originally.

The decision of the Circuit Court of Appeals is in conflict with the principles of law declared by this court in *Texas & Pacific Railway Company* v. *Southern Pacific Company*, 137 U. S. 48, 56, wherein this court held that where a decree is entered by consent based on an agreement or compromise agreement of the parties, it is not a decree based on judicial investigation and judicial determination, but that, in entering it, the court merely exercises an administrative function in recording what had been agreed to between the parties. For other cases see footnote.[9]

The decision of the Circuit Court of Appeals below is in conflict in principle and policy with the decision of this

[9] *Russel* v. *Place*, 94 U. S. 606, 609, 610. Manhattan Life Insurance Co. v. *Broughton Trustee*, 109 U. S. 121, 125; *Fitz Henry Hommer, Plaintiff in error*, v. *George L. Brown*, 16 Howard (57 U. S.) 354, 365, 366.

Court as held in *Heckman* v. *United States*, 224 U. S. 413, and as followed in *Goat* v. *United States*, 224 U. S. 458, and involving transactions by the mentally incompetent, restricted Indian, Jackson Barnett, see *Marshall L. Mott* v. *United States*, 283 U. S. 747-753; *United States, petitioner*, v. *Equitable Trust Co., et al.*, 283 U. S. 738-747; in which this Court held attempts to alienate his property and rights thereunder because of his mental incompetency, even where the same were approved by the Secretary of the Interior, representing the United States, were set aside because of the mental incompetency of said Jackson Barnett and generally in all these cases, this Court upheld the restrictions applying to Indians generally in reference to the alienation of their property and rights thereunder, and especially applicable to mentally incompetent, restricted Indians and which includes a decree as in the case at Bar, based upon a compromise agreement and consent without judicial investigation and determination.

We also believe that the decision of the Circuit Court of Appeals is in conflict with the decisions of the Circuit Court of Appeals of the Eighth Circuit in the case of *Jennings* v. *Wood*, 192 Fed. 507, wherein the court there held that the Secretary of the Interior could not approve an invalid lease and by such approval make an invalid lease valid, and said decision also conflicts with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Holmes* v. *United States*, 33 Fed. (2) 688, to the same effect.

The decision of the Circuit Court of Appeals is in direct conflict with the decision in *Goodrum* v. *Buffalo*, 162 F. 817, decided by the Eighth Circuit Court of Appeals, in which the court said: That the disability of these Indians is imposed by statute, it must therefore follow that the record and judgment of a court disclosing on their case (as in the case at Bar) that the disqualified Indian was

entering into an agreement for the submission of the question of his rights to dispose of his lands, was in no wise different from such a proceeding participated in by a minor infant, and that any and all schemes and devices resorted to for the purpose of acquiring title to the Indian's allotments during the period of such limitation are abortive and this for the palpable reason that it is a period of absolute disability. For the other cases and Text Work in conflict in principles see footnote.[10]

We also believe that the decision of the Circuit Court of Appeals is in conflict with the decision in *City of Baton Rouge et al.* v. *Baton Rouge Water Works Co.*, 30 F. (2d) 895, 897, Fifth Circuit Court of Appeals, and which involved a compromise and consent decree, and the court there held that the entry of such a decree was not based on an adjudication by the court, but an embodiment of an agreement of the parties and that, if the Louisiana Constitution stood in the way of an agreement for irrevocable rates, it would likewise stand in the way of a compromise decree attempting to sustain such an agreement.

From all the foregoing, we think it is clearly apparent that the Circuit Court of Appeals has decided an important question of local law of the State of Oklahoma in a way probably in conflict with the consistent and well settled decisions of the Supreme Court of that State. And has decided a federal question in a way probably in conflict

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[10] *Hodgson* v. *Vroom*, 266 Fed. 267; *American Radium Co.* v. *Hipp et al.*, 279 Fed. 601; *Kelly* v. *Town of Milan*, 21 Fed. 842, affirmed by this court, 127 U. S. 139, 32 L. Ed. 77; *Bergman* v. *Rhodes*, 165 N. E. 598, 65 A. L. R. 344; *Heyman* v. *O'Connell*, 13 N. E. (2) 100; Mr. Freeman in his work on Judgments, 5th Ed. Vol. 3, Sec. 1350, p. 2773, says: "The consent judgment is, undoubtedly, contractual in its nature, and should be construed as though it were a contract.

"It is based wholly upon the agreement of the partise with respect to the matter in controversy in the action, and involves no judicial inquiry into, or preliminary adjudication of the facts or the law applicable thereto. The agreement or consent renders this unnecessary and improper."

with the applicable decisions of this court. And the decision is in direct conflict with the decision in *Goodrum* v. *Buffalo, supra,* of the Eighth Circuit Court of Appeals and the decision in *City of Baton Rouge, et al.* v. *Baton Rouge Water Works, supra,* of the Fifth Circuit Court of Appeals.

As heretofore stated, the amount claimed in the case at Bar exceeds the sum of $20,000,000.00 including interest provided by Oklahoma law. (Par. 27, Plaintiff's Complaint No. 39 Civil R. 36).

We think that the granting of the writ of certiorari is justified by the rule in *Marshal L. Mott* v. *United States,* 283 U. S. 747, 753; *Royal Indemnity Company* v. *United States of America,* 313 U. S. 289, 293; *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 296; *International Railway Co.* v. *Davidson,* 257 U. S. 506, 510; *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163; *General Electric Company* v. *Wabash Appliance Corporation,* 304 U. S. 364; The *Toledo Pressed Steel Co.* v. *Standard Parts, Inc.,* 307 U. S. 350.

The questions presented are of general and considerable importance to the public dealing with Indians and with Indians' transactions with the public, and if the decision of the Circuit Court of Appeals below is permitted to stand it will create confusion in transactions of this character in the future as said decision may affect wealth and property of vast amounts; and tends toward confusion in the application and administration of the law as declared by the decisions of the Supreme Court of Oklahoma, the decisions of this Court and the Lower Federal Courts, all of which are in conformity and accord with the general law and policy of the United States in dealing with the Indians, in protecting their rights and in preserving their property and wealth.

We think it is apparent that the problem here presented is likely to constantly recur unless finally settled by this

court and the questions presented are justiciable, of gravity and of general importance.

Therefore, it is respectfully submitted that this petition for writ of certiorari be granted.

November, 1944.

Respectfully submitted,

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BRIEF

Statement of Facts

The facts are stated in the petition, pages 6-14.

Argument

The Reasons For Granting the Writ and the authorities in support thereof are discussed sufficiently in the petition as to obviate the necessity of repetition in the brief and only a summary of the facts, law and argument will be presented here.

The Court below (CCA), in its opinion, rested its decision on the following statement:

> "It is our opinion that the decree of the court was not a consent decree; that it was a judicial determination of the issues involved in the case in which it was entered, and it is a valid and binding decree, and constitutes an effective bar to the prosecution of this case."
>
> "This is not a case in which the parties agreed as to the judgment which should be entered, submitted to the court, and had the court, pro forma enter the judgment upon which they had agreed, without an independent judicial inquiry and determination of the issues involved in the case." (142 Fed. (2) 935, 937).

In arriving at its conclusion above the Circuit Court of Appeals conceded certain vital facts involved in the determination of the questions to be established thus; first, that Jackson Barnett was so mentally incompetent that he was incapable of executing a valid oil and gas mining lease on his allotted lands and that the lease in question was void; second, that the trial court in consolidated cause 216 Equity committed error in finding and concluding that the ratification of the lease by the representatives of Bar-

nett and its approval by the Attorney General and the Secretary of the Interior gave it validity.[11]

The foregoing conclusions of the Circuit Court of Appeals narrow the questions to be here briefed and discussed.

First, did the Circuit Court of Appeals err in its conclusion that said decree was not a consent decree, but an adjudication of the issues raised by the pleadings in Consolidated Cause 216 Equity?

Second, did the trial court have jurisdiction to enter the decree it did in said cause?

Taking up these questions:

Point I

Said Circuit Court of Appeals committed error in its conclusion that such decree was not a consent decree as defined and recognized in the general law of the land and in the decisions of this court and of the Circuit Courts of Appeal and State Courts and by leading authors and text writers.

The court's conclusion that the Final Decree herein was based upon a judicial determination of the issues in Consolidated Cause No. 216 Equity is so contrary to and wholly unsupported by the record, as to lead to the belief that the court has disregarded all the pleadings and facts, including the terms and provisions of the compromise agreement and of the decree itself.

Thus one of the defenses set up by respondents was that the compromise settlement was the basis for a consent decree against Jackson Barnett, incompetent, and that as

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11 "It may be conceded for the purpose of this opinion that Jackson Barnett was mentally incompetent and could therefore not execute a valid oil and gas lease. It may also, for the same purpose, be conceded that the court erred in Consolidated Equity 216 in concluding that the ratification of the lease by the representatives of Barnett and its approval by the Attorney General and the Secretary of the Interior gave it validity." 142 Fed. (2) 935, 937.

such there could be no review or impeachment thereof in the manner the same is here sought to be reviewed.[12]

The United States in its role as guardian of Jackson Barnett, was unwilling to submit the question to the court for adjudication, which the compromise agreement was intended to avoid. Thus, in his letter of December 21, 1927, the Assistant Attorney General objects to submitting to the court the question as to the power of the Secretary to make a new lease for Barnett, reminding the District Attorney that it has been frequently decided that a lease or contract to convey allotted property of Indians of the Five Civilized Tribes must be initiated by the Indian owner. (R. 728)

That the counsel representing respondents understood well the character of the decree to be purely a compromise settlement decree approving the settlement which had been "O. Ked" by "all the parties to the Action" including the United States District Attorney. See letter of Diggs, Coun-

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[12] In paragraph 5 of the Amended Answer of the Gypsy Oil Company et al. (R. 399-400) where, referring to the compromise agreement and decree, it is alleged that:

> "• • • the United States, acting by and through the Secretary of the Interior Department, and by its Department of Justice, acting by and through its Attorney General, approved the compromise agreement and settlement complained of in the plaintiff's complaint herein and so recommended and caused the same to be carried into final effect, by the rendition and entry of the final consent decree in this action sought to be reviewed."

In paragraph 13 of the same pleading (R. 407) this appears:

> "The final decree of July 11, 1929 rendered and entered in Consolidated Cause No. 216 Equity was a decree rendered by consent of all the parties to cause No. 216 Equity, and Cause No. 260 Equity—consolidated by order of this court and afterward known as Consolidated cause No. 216 Equity, and as such consent decree is not subject to review or to be impeached or set aside in the manner that the same is sought to be reviewed or set aside in this action, in that the plaintiff's complaint herein fails to disclose any error of law appearing on the face of the record in Consolidated cause 216 Equity • • •"

sel for Respondents, transmitting said compromise to the Attorney General for approval. (R. 742).

The First Assistant Secretary of the Interior Department entertained no doubt that by the agreement and the approval of it by the court, there would be a "final settlement of Barnett's claim" and that was to be effected by "a ratification of his lease as of the date of its execution without regard to whether it may have been void" (R. 738).[13]

One of the purposes of the agreement is clearly set forth in the record (R. 744) where the U. S. District Attorney, in transmitting the agreement to the Attorney General, says:

> "I also understand that the prospective settlement carries no finding or conclusion as to Jackson Barnett's mental condition."

It was clearly the intention of the departments of the United States that there should be no judicial determination entered in the cause which determined any right of Barnett under the issues of the suit, as is shown in the same communication (R. 744) which states as set out below.[14]

The petition for the approval of the compromise agreement recites:

> "That a compromise agreement had been reached between the parties to this action, which had been executed in quadruplicate, and is herewith submitted to the court for its inspection, and with the request that it be approved." (R. 100).

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[13] "By the compromise agreement and the above mentioned order, the validity of the lease is recognized and the lease is ratified and confirmed and adopted as a valid instrument from the date of its execution."

[14] "In appearing I suggested to the court that I desired no order entered except one that was thereafter to be approved by you and the Department of the Interior, and having made this suggestion theretofore to the counsel, I was advised that the order had been prepared in keeping with such suggestion. * * *"

Then follows the prayer that "* * * this Honorable Court enter an order herein approving the compromise agreement * * *". No request was made to the court to decide anything save and except whether it would or would not give its approval to said agreement. In his letter of May 14, 1929 (R. 747) the Assistant U. S. Attorney, representing the Government in said cause, makes it clear that there was to be no judicial hearing or trial nor any finding of fact by the court and consulted the attorney for the Gypsy Oil Company, one of the respondents herein, and was advised "that no trial or finding was anticipated and that the settlement would be submitted to the court as a settlement * * *".

The Assistant District Attorney understood that the purpose of the settlement was to give effect to a void lease, and was unable to understand how such result could be accomplished by an agreement between the parties to the suit.[15] (R. 747). He also clearly understood, as did the parties to the compromise agreement, that its purpose was to avoid any judicial inquiry into the validity of the lease which the agreement purported to ratify. And he knew, as did the Attorney General (R. 728), that the question of the power of the Secretary of the Interior to make a lease for Jackson Barnett should not be submitted for judicial inquiry.

The whole purpose of the compromise agreement was to avoid a judicial determination of the issues in the suit knowing that, if there were such trial, the judgment of the court must follow numerous decisions of this court and of the Circuit Courts of Appeal and of the State Court sus-

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[15] (Assistant District Attorney—to Attorney General):

"Since a failure of consideration is not an issue in this case, I am unable to understand how the payment of $35,000 *can make a void lease valid.*"

taining the rights of Jackson Barnett (see authorities cited in petition) and that the respondents herein resorted to a scheme and device by which they sought to avoid an adverse decision upon the merits of the suit and procured a consent judgment under an agreement with the representatives of Barnett who were incapable of binding Barnett to such judgment.

The further proof, if there be any further proof needed, that there was no hearing or trial had upon any of the issues involved in the Consolidated cause 216 Equity, nor were any facts discussed, nor law presented touching same, is conclusively shown by the statements of R. H. Wills, Attorney for Mid-Continent Petroleum Corporation (R. 670, 671), John M. Goldesberry, United States District Attorney (R. 672-677) and James B. Diggs, Counsel for Gypsy Oil Company, *et al.*, respondents (R. 677-684), showing conclusively that there was no trial or hearing upon any issue in said Consolidated cause, notwithstanding the statement in the opinion of the Circuit Court of Appeals to the effect that these witnesses sustained the conclusion of the court that there was a hearing upon the issues of the cause. (R. 827) 142 F. (2) 935-937). There is an abbreviated statement of the material parts of testimony of these witnesses —as to what proceedings were had—when both the compromise agreement and the Final Decree were presented for signature of the court, one on June 23, 1929, the other on July 11, 1929—which reduced statement appears as an Appendix to Petition for Rehearing, in the Circuit Court of Appeals (R. 859-862).

The language of the decree itself has closed the door upon any contention that there was any judicial investigation into the issues of law and fact set up in said Consolidated cause—by its recital:

> "* * * that Jackson Barnett, by and through his representatives, has ratified, confirmed and adopted

the Departmental oil and gas mining lease executed by him on March 5, 1912, to H. U. Bartlett."

The record affirmatively shows that there was no judicial investigation essential to any determination of the mental competency of Barnett to execute the lease, and affirmatively shows that none of his representatives had power to ratify it for him.

The compromise agreement sets forth the detail of facts which these representatives of Barnett and these respondents saw fit to incorporate therein (R. 769, 772-782-786) and upon this detail of facts declare their agreement of compromise (769, 782-785) and set forth what the court's decree shall contain, in exact terms (R. 769, 784-785), and submit no fact or law upon which the court shall judicially pass judgment; and submit to the court a request for its approval of what the parties have, in all things, agreed the judgment shall be. (R. 100-107).

The only function performed by the court was to give its approval to the terms and provisions of the compromise agreement as an administrative function in recording what had been agreed to between the parties. *Texas & Pacific Ry. Co.* v. *Southern Pacific Co.*, 137 U. S. 48, 56.

Therefore, petitioner asserts that the Circuit Court of Appeals committed error in its conclusion that the final decree entered in Consolidated 216 Equity was not a consent decree but was a judicial determination of the rights of the patries thereto under the issues of said cause.

Point II

As an incident to such error, the next question to be determined is whether the representatives of Jackson Barnett had any legal capacity to bind said Barnett, incompetent, to the terms and conditions of said compromise agreement and judgment.

It is fundamental that a mentally incompetent person is incapable of entering into any contract. This court in 1872, in *Dexter* v. *Hall*, 15 Wall. 9, 21 L. Ed. 73, laid down the following rule as determining the status of an unadjudicated, mentally incompetent person, with reference to his capacity to make contracts which will be binding upon him, under which rule Barnett was without capacity to contract. That decision has been followed uniformly by this and all the federal courts since that time. This court, at page 20 stated:

> "The fundamental idea of a contract is that it requires the assent of two minds, a lunatic and a person *non compos mentis* has nothing which the law recognizes as a mind; and it would seem, therefore, upon this principle he cannot make a contract which may have any efficacy as such."

It is as fundamental that no one can represent Barnett in making a binding contract the effect of which is to divest him of his ownership or title to his property and transfer the same to others.

The Circuit Court of Appeals in its opinion has decided and conceded that the representatives of Barnett, all of them, which includes the guardian *ad litem* and the next friend and Secretary of the Interior and the Attorney General, all that were recognized by any of the courts below, had no authority to legally bind Barnett to the terms of the agreement upon which the consent judgment was entered.

Under the State laws of Oklahoma and decisions construing those laws, a guardian *ad litem* cannot compromise and settle the suit or action brought for his ward or incompetent. Revised Statutes of Oklahoma, 1941, title 12, Sec. 279 (1931 Stat. Sec. 213). See authorities cited in Petition, especially *Tucker* v. *Leanord, supra.*

Under this statute and the decisions, the State courts are without jurisdiction or power to enter upon the dockets of said courts any judgment of compromise without hearing all the facts constituting the cause of action of the minor or incompetent person in a regular trial of the issues of said suit.

The State statutes and decisions touching this question shall be followed and enforced under the decision of this court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 88, and under Sec. 725, Title 28 U. S. C.

The same principle was set out and followed in *Goodrum* v. *Buffalo,* 162 Fed. 817, and other federal cases. *Fulsom* v. *Quaker Oil Co.,* 28 Fed. (2) 398; and *Adams* v. *Osage Tribe of Indians,* 50 Fed. (2) 918, 920.

In *Goodrum* v. *Buffalo, supra,* 8th C. C. A., in 1908, it was held that a legal guardian of a minor had no authority to bind his ward to a stipulation of facts submitted to the court upon which stipulation judgment was entered against the minor in an action to vacate a deed by said minor to allotted lands executed in violation of restrictions against alienation thereof under the Acts of Congress applicable thereto. This case has been followed and cited in numerous decisions by both federal and State Courts, many of which are set out in the petition.

Congress has provided the only method by which the property rights of Jackson Barnett could be divested and transferred to others. Sec. 2 of the Act, approved May 27, 1908, 35 Stat. 312. See footnote 1 of the petition. This statute provides the only method by which the title of the oil and gas under Barnett's lands could be leased legally and that is by and through a legally appointed guardian under the laws of the State of Oklahoma making provision therefor. There being no duly appointed guardian to represent Barnett, there could be no valid lease executed

by him and therefore there is no valid lease in existence under which said respondents might claim rights.

We should call attention of the court to the appearance in the compromise agreement and consent judgment of the names of two alleged legal guardians, McCullom and Hall, of Jackson Barnett, appointed in Creek and Okmulgee Counties, respectively, Oklahoma, in the year 1927, who appear as parties to said contract. These two alleged guardians procured their alleged appointments, one in Creek County, Oklahoma, and the other in Okmulgee County, Oklahoma, upon the representation that Barnett was a citizen of California who owned land in said respective counties of Oklahoma (R. 810-811-812) and a person "subject to guardianship", said appointments being made under the provisions of Sec. 6570 Revised Laws of Oklahoma, 1910, which provides for * * * "persons liable to be put under guardianship according to the provisions of this chapter, and who reside without this State, and have estate therein." Barnett was a citizen of Oklahoma but had been theretofore and was when said appointments were made, temporarily residing in California, with his legal domicile in *Muskogee* County, Oklahoma, where petitioner was appointed as administrator of his estate upon the death of said Barnett (R. 793-796). Under the provisions of Sec. 1449 Revised Laws of Oklahoma, 1921, providing for the appointment of guardian for a mentally incompetent person, it was required that the incompetent must be a resident of the County in which said appointment was made and must be personally present at the time said appointment was made. *Hathaway* v. *Hoffman*, 53 Okla. 72, 153 Pac. 184. And further that there is no jurisdiction under that statute to appoint one beyond the limits of the County of his residence. *Welch* v. *Focht*, 67 Okla. 275, 171 Pac. 730; *State ex Rel. Monahawee* v. *Hazelwood*, judge, 81 Okla. 69, 196 Pac. 937; *Martin* v. *O'Reilly*, 81

Okla. 261, 198 Pac. 303. These appointments were both totally void and neither of said alleged guardians were recognized by any of the lower courts having to do with the Barnett suits, including the Circuit Court of Appeals.

After the Supreme Court of Oklahoma in 1926 had held that Carl J. O'Hornett, who pretended to adopt the thumbprint lease of Barnett of March 5, 1912, "as legal guardian", had never been legally appointed as such guardian (In re Appeal of Jackson Barnett, *supra*); and the action 216 Equity had been brought against respondents for the value of the oil removed by them amounting to millions of dollars, they realized that they had no valid title to the oil and gas removed and were liable therefor. They then began a plan and scheme to defeat the claim, first, by bringing a counter suit against Barnett, incompetent, in which they attempted to set up claims of equitable rights to the oil and gas by reason of their long occupancy of the land under the void lease, and their development of the oil thereon and the payment to the Secretary of the Interior of benefits in the form of "royalties" under said void lease and pleaded equitable estoppel against this incompetent Indian by reason of his silence and failure to assert his claim. See paragraphs of Respondents' Bill 260 Equity, pars. 20, 21, 22, 28, 29, 30 (R. 66-68, 73-77). They also prayed for a judgment vesting them with the ownership of the oil and gas under said lands and for quieting their title to the same and enjoining Barnett and his heirs from ever asserting title thereto (R. 76-77). They also induced the Interior Department to request the Attorney General of the United States to intervene in said action, ostensibly under the provisions of the Act of April 12, 1926, 42 Stat. 240, but in fact to espouse the cause and claim of Respondents herein instead of defending and protecting the Indian's rights, as their duty as guardian required (R. 715-722, 726-727) and, while admitting in said intervention

in both of said actions, that Barnett was a mental incompetent and incapable of making a valid lease, yet, by reason of Respondents' long possession of the lands and the development thereof and the payment in the form of royalties to the Secretary of the Interior of benefits for the use of Barnett, that it would be inequitable to deprive said respondents of said oil and prayed for the dismissal of Barnett's suits and the quieting of the title to said oil and gas in said respondents and for all the relief prayed for by the respondents (R. 91-99).

After consolidation of said actions as Consolidated 216 Equity, the same was set for trial several times (R. 749, 750, 751), but never tried. The respondents, instead, resorted to the next step in avoiding a judgment against them, which was inevitable, if the action was tried upon the merits, by effecting a compromise agreement and settlement, by the terms of which it was agreed by the guardian *ad litem* and the next friend and respondents that the void lease of Barnett would be, by Barnett, "ratified, confirmed and adopted" as a "valid lease from the date of its execution, March 5, 1912" and that the title of the respondents to the oil and gas in said lands be forever quieted, and that Barnett's action be dismissed with prejudice and that said incompetent Indian and his heirs "be perpetually enjoined from claiming any right, title or interest thereto," and further that the court having jurisdiction shall enter a judgment in accordance with the exact terms and conditions of the agreement above stipulated. (R. 105-107, 769, 772-785-786). That said presiding judge declined to approve said agreement and to enter said decree, until after said agreement had been fully approved by the Secretary of the Interior and the Attorney General. That thereafter the Secretary of the Interior and the Attorney General of the United States were urged and requested by the respondents to give their approval to said compromise agree-

ment and to such decree (R. 715-722, 726-727) and did on the 26th and 27th days of June, 1929, affix their approval thereto. (R. 771-772). That after the approval aforesaid the presiding judge signed the decree.

Thus ended the plan and scheme which these respondents devised and followed, to evade and escape the judgment of the court and the law, which would compel them to restore to said Indian his rightful property amounting to millions of dollars, by resorting to a fraudulent deprival of this Indian, whose representatives failed to protect him and discharge their duties as such representatives, of his constitutional right of a trial of his cause on the merits and by procuring the entry of a consent decree upon stipulations and agreements by parties wholly unauthorized to represent him, secured a judgment which the court was without jurisdiction or power to enter. All in violation of the Due Process clause of the Fifth Amendment to the Constitution of the United States and Sec. 2 of the Act of Congress, approved May 27, 1908, *supra*, and of the decisions of this court, and other federal and state courts. See authorities cited in the petition.

Point III

The trial court was without jurisdiction to render and enter the decree it did in Consolidated 216 Equity, the effect of which decree and judgment was to divest said incompetent Indian of his ownership and title in seven-eighths of all his estate and vest the same in others in a manner violative of the Acts of Congress set forth in petition herein making provision for the exclusive manner of transferring rights and ownership therein to other persons.

In its opinion the Circuit Court of Appeals, after conceding that the judgment of the District Court was erroneous in holding that the representatives of Barnett by ratify-

ing the admittedly void lease, gave it validity used the following language:

> "The court had jurisdiction of the subject matter and of the parties to the controversy. Jurisdiction of the subject matter includes power to determine with binding effect every justiciable issue involved. Such jurisdiction is not limited to deciding issues correctly." 142 F. (2) 935-937.

The foregoing statement correctly states the principle but the court cannot apply that principle to the facts disclosed by the record in this case as this record conclusively establishes that no justiciable issue was determined, as we have argued and shown under Point I. There can be no question that the trial court had jurisdiction over the parties and the subject matter of Consolidated 216 Equity and had there been a trial and hearing upon the question of capacity of Barnett to execute the lease and the testimony thereon heard by the court and the law applicable thereto presented and had the court rendered its decision upon such trial and issues, the opinion of the Circuit Court would have stated the correct conclusion. *Swift & Company* v. *United States*, 276 U. S. 311, cited by court in its opinion, can have no application whatever as authority for its conclusion upon this decree.

The decree under attack in the case at Bar was in no sense a decree upon any justiciable issue involved but was purely a judgment upon a consent by parties pretending to represent the incompetent, restricted Indian, none of whom had any authority to bind said Indian to such stipulation, and in the court's conclusion that said decree was binding upon Barnett and his heirs, even though the decree was erroneous, is another way of saying that the trial court could enter a decree outside the issues of the suit and without a trial or adjudication of any of the issues which we declare not to be the law. The Circuit Court of Appeals has over-

looked the applicable principle set out by Freeman on Judgments, 5th Ed., Vol. 1, Sec. 354, p. 734, wherein he states the correct rule as to "lack of jurisdiction to enter any judgment outside of the scope of the pleading and the issues thereof.[16]

Under this rule the court was without jurisdiction to enter any judgment which would be binding on Barnett, the incompetent, first, because the sole basis of the judgment was by reason of a consent agreement, which in terms authorized and directed the form and contents of the decree; second, the parties representing Barnett were without any authority or power to bind him to said consent judgment; third, the court was without jurisdiction to enter any decree binding on Barnett without a trial and hearing and an adjudication of the issues involved in the action. We again cite and rely on authorities cited in the petition.

Conclusion

The petitioner respectfully urges that the writ of certiorari be granted and the case considered by this Honorable Court, and the order and judgment of the Circuit

[16] "Whether the court lacked power to act in the first instance, by reason of its failure to acquire jurisdiction over the subject-matters, or the parties, or having been invested with such power, proceeded to make a determination outside or beyond the legitimate scope thereof, the result is the same. In either case, the vitalizing element is lacking—the power to decide—without which no force or conclusiveness can be claimed for the judgment. Hence, though the court may have acquired the right to act in the cause, and been put in possession of full jurisdiction to go ahead and dispose of the issues involved, its judgment in excess of the jurisdiction thus acquired or which transcends the judicial powers which it may rightly exercise under the law of its organization, is subject to collateral attack for want or excess of jurisdiction, even though the parties may have acquired or consented to the exercise of the jurisdiction which the court assumed to exercise, for no act or volition of the litigants can confer a power upon the court which the law does not authorize it to exercise."

Court of Appeals of the Tenth Circuit Court and the District Court be reversed and that petitioner have such further and other relief to which he may be entitled.

Respectfully submitted,

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November 20, 1944.

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(7)

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No. 692

In the Supreme Court of the United States

October Term, 1944.

JAMES T. SPENCER, ADMINISTRATOR OF THE ESTATE OF JACKSON BARNETT,
Petitioner,
vs.
GYPSY OIL COMPANY, A CORPORATION; GULF OIL COMPANY, A CORPORATION; F. A. GILLESPIE, *ET AL., Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF *CERTIORARI* AND TO HIS BRIEF IN SUPPORT THEREOF.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF *CERTIORARI* AND TO HIS BRIEF IN SUPPORT THEREOF.

Petitioner's petition for *certiorari* will have to be denied, because, as we will hereafter establish, such petition, in the final analysis, merely calls for a review of the evidence herein or inferences drawn from it, and this court has repeatedly held that it will not grant a writ for such purpose.

The United States, which for a time was a party to this action, obviously concluded that there was no merit in petitioner's claims and that the same were untenable. On February 20, 1939, about three months after the commencement of this action, the United States intervened therein and took a position on behalf of petitioner or in accord with his

claims. Thereafter, pursuant to a pre-trial conference, the United States filed a brief in support of the admissibility upon the trial of the case of evidence as to the alleged mental incompetency of Jackson Barnett on March 5, 1912, the date of the execution of the oil and gas lease involved herein. Thereafter, the District Court advised the parties that upon the trial of the case it would hold such evidence inadmissible. Thereafter, on June 26, 1942, the United States moved for, and was granted, leave to withdraw its complaint in intervention, and thereby abandoned petitioner. (R. 614-616) Subsequently, the District Court, and later the Circuit Court of Appeals, held petitioner's claims were without merit and untenable. Apparently, petitioner's strategy is that constant and repeated reiteration of his claims might somehow, somewhere, or at some time eventuate in their adoption.

Petitioner seems unable to resist making inaccurate statements of fact or qualifying same to fit the law, and *vice versa*, but, in spite of his indulgence in this field, he winds up with misfits. Some outstanding examples of petitioner's handiwork with the factual matters herein are as follows:

1. Petitioner repeatedly asserts that it is admitted that on March 5, 1912, the date of the execution of the oil and gas lease involved herein, Jackson Barnett was mentally incompetent. This is inaccurate. On the contrary, respondents, and each of them, have at all times maintained that Jackson Barnett on said date was mentally competent. Moreover, the mental competency of Jackson Barnett on said date was one of the pivotal issues of fact involved in the action or actions in which the judgments or decrees which are attacked by petitioner were made and entered. (R. 72, 131, 169, 208, 352, 366, 403, 422, 441, 506)

2. Petitioner repeatedly asserts that it is admitted that the aforesaid judgments or decrees were void and invalid. This is inaccurate. On the contrary, respondents have at all times mentioned, and still maintain, that said judgments or decrees were and are good and valid. (R. 351, 354, 363-365, 398, 433-435, 443, 444, 500, 509-510)

3. Petitioner repeatedly asserts that it is admitted that the oil and gas lease involved herein was and is void or invalid. This is untrue. On the contrary, respondents have at all times maintained, and still maintain, that said oil and gas lease was and is good and valid. (R. 147, 148, 169, 170, 208, 209, 351, 366, 367)

4. Petitioner repeatedly asserts that it is admitted that the aforesaid judgments or decrees were and are merely and solely consent decrees or judgments, entered merely and solely *pro forma* upon the compromise agreement involved herein and without any independent judicial inquiry and determination on the part of the District Court which made and entered the same. This is inaccurate. On the contrary, respondents have at all times maintained, and still maintain, that, while said judgments or decrees were initiated by said compromise agreement, the same were not made and entered until the District Court had made all necessary independent judicial inquiry and determination to render and constitute said judgments or decrees *res adjudicata* of both the issues of law and of fact involved in the case or cases in which the same were made and entered. (R. 353, 354, 425, 426, 531, 533) Moreover, both the District Court, in its findings of fact herein, as we will hereafter show, and the Circuit Court of Appeals, in its opinion, found and held that said judgments or decrees were not made and entered until the District Court had made all necessary independent ju-

dicial inquiry and determination to render and constitute said judgments or decrees *res adjudicata* of both the issues of law and of fact involved in the case or cases in which the same were made and entered. (R. 619, 826-827) Hereafter we will show that, in the final analysis, petitioner's present petition is bottomed upon his inaccurate and wholly insupportable assertions with respect to the instant facts.

5. Petitioner repeatedly asserts that the Circuit Court of Appeals, in its opinion herein, conceded that Jackson Barnett was mentally incompetent on March 5, 1912, and that the oil and gas lease involved herein was and is void. Such assertions constitute only partial truths. On the contrary, the only concessions made by the Circuit Court of Appeals were "for the purpose of this opinion." (R. 827) In other words, the Circuit Court of Appeals was merely saying that even if it be assumed that such mental incompetency existed, or that if it be assumed that said lease was void, the aforesaid judgments or decrees were nevertheless *res adjudicata* of all the issues, both of fact and of law, involved in the case or cases in which the same were made and entered, and that none of the issues of fact or of law involved in said case or cases could be relitigated for the purpose of establishing the invalidity of said judgments or decrees, or that any of said issues, either of law or of fact, were erroneously decided or adjudicated by said judgments or decrees.

The Circuit Court of Appeals, in its opinion herein, has made a brief, clear and forthright statement of the facts necessary to a consideration of petitioner's present petition, and we do not deem it necessary to repeat such facts herein. However, we will hereafter make a more detailed statement than was made by the Circuit Court of Appeals of certain

facts which render petitioner's present petition absolutely without merit and untenable. Aside from the many inaccurate and unfounded statements of fact made by petitioner, to some of which we have heretofore adverted, the only variations in petitioner's statement of facts and the statement of facts of the Circuit Court of Appeals consist merely of immaterial factual details and rhetorical color and amplification.

In so far as this action is concerned, petitioner is in a sense a mere interloper, because he is merely prosecuting this action as administrator of the estate of Jackson Barnett, the full-blood Creek Indian involved herein, and because the subject-matter of this action, being restricted Indian property, is not property subject to administration by any probate court of Oklahoma. Petitioner has no duty with respect to such property, and his interest is not hard to see. Such interest is not wholly charitable. The proper parties to maintain this action are the United States or the heirs of Jackson Barnett. See *Barnard* v. *Bilby, et al.*, 68 Okl. 63, 171 Pac. 444; *Bilby* v. *Noble*, 106 Okl. 302, 234 Pac. 198; and *March, et al.*, v. *Peter, et al.*, 179 Okl. 207, 64 P. (2d) 912.

In the District Court, petitioner undertook to attack the judgments or decrees which are involved herein, and which were made and entered more than nine years prior to the commencement of his action, upon the following grounds:

1. That said judgments or decrees were procured by fraud.

2. That said judgments or decrees were and are void because the same were merely and solely entered *pro forma* upon the compromise agreement involved herein and without any independent judicial inquiry and determination on

the part of the District Court which made and entered the same; and

3. That, because said judgments or decrees were and are void, for and upon the two aforesaid reasons and grounds, the same were not and are not *res adjudicata* of the alleged mental incompetency of Jackson Barnett on March 5, 1912, or of the alleged invalidity of the oil and gas lease involved herein, and, consequently, that he is not precluded from now litigating, and is free to now litigate, the question of the fact of such alleged incompetency and of the numerous questions of both fact and law necessary to a determination of the alleged invalidity of said lease.

It is noteworthy, that in the District Court petitioner did not initiate the question of any insufficiency of the court proceedings immediately preceding the making and entering of the judgments or decrees under attack. (R. 6-39) It was the United States, in its petition of intervention, that first interposed this particular ground of attack. (R. 114-115) And we have heretofore seen that the United States, evidently realizing there existed no ground or grounds justifying the vacation of said judgments or decrees, withdrew from the case. (R. 614-616)

The District Court found herein, as a matter of fact, that the judgments or decrees attacked by petitioner were not "obtained as the result of any fraud, actual or legal," and that said judgments or decrees and the compromise agreement and its approvals, which preceded the making and entering of said judgments or decrees, were "free of fraud and were made and entered into in good faith," and that there was no evidence which indicated or tended to prove that any person "had performed or done any act or thing that would or should have caused the court to refrain

from entering the judgment it did enter." (R. 620) In the Circuit Court of Appeals petitioner did not rely upon any claim of fraud, and does not now present any such claim. Consequently, the first of petitioner's aforesaid grounds of attack is out of this case. But notwithstanding this, petitioner, by mere statement and inuendo, attempts to impute corrupt intent and purpose to every single important transaction, both private and governmental, involved in this case, including, among other things, the approval by the Secretary of the Interior of the oil and gas lease involved herein, the conduct of the United States and its officials in the case or cases in which the judgments or decrees under attack were made and entered, the making and entering into, and approval by the Attorney General of the United States and the Secretary of the Interior of the compromise agreement involved herein, and the withdrawal of the United States as a party to this action. According to petitioner, everything from the beginning to now which stands in his way was either fraudulent or erroneous. However, it is impossible for us to believe that there can be such an unbroken chain of fraud or error.

A mere casual glance at the third of petitioner's aforesaid grounds of attack discloses that the same is wholly dependent upon the tenability of the second of his aforesaid grounds of attack. And petitioner admits herein that unless he can maintain and sustain the second of said grounds of attack, his third ground of attack is untenable. (Petitioner's brief herein, p. 35.) Consequently, in the final analysis, the question is whether there is any merit in the second of petitioner's aforesaid grounds of attack. The Circuit Court of Appeals held there was not, and we think it was undoubtedly right.

The gist of the opinion of the Circuit Court of Appeals is embraced in the last five paragraphs thereof, which are as follows:

"Appellant recognizes that to be successful he must get around the judgment in Consolidated No. 216 Equity quieting appellees' title to the oil and gas lease. This he seeks to do on the ground that the judgment is void because it constituted a consent decree. It is argued that neither a legal guardian, a guardian *ad litem*, nor a next friend of an incompetent person can consent to a compromise judgment, and that such a judgment is absolutely void. On the other hand, appellees urge with considerable force that appellant is without authority to maintain this action because the funds in question are restricted and as such do not constitute assets subject to administration by an administrator in a state court of competent jurisdiction. This contention is not without merit. Numerous other questions are raised, and a great number of authorities are cited in support thereof.

"In the view we take of the matter, it is not necessary to the determination of the controversy to consider or pass upon these many issues. It is our opinion that the decree of the court was not a consent decree; that it was a judicial determination of the issues involved in the case in which it was entered, and is a valid and binding decree, and constitutes an effective bar to the prosecution of this case.

"This is not a case in which the parties agreed as to the judgment which should be entered, submitted it to the court, and had the court *pro forma* enter the judgment upon which they had agreed, without an independent judicial inquiry and determination of the issues involved in the case. The order of June 13 recites that the compromise agreement was submitted to the court for its inspection and that having examined the same, as well as the petition of the guardian *ad litem*

'and being otherwise sufficiently advised,' the court adjudged and decreed that it be approved. The compromise settlement contained not only the agreement of the parties but also the facts in the case, together with the questions of law. It follows, therefore, that when the court made its examination of the issues it had before it all of the facts and questions of law set out in the agreement. In addition to this, the court informed itself outside of the facts set out in the written stipulation, and from all this determined the nature of the judgment which should be entered. The testimony of John M. Goldsberry and James B. Diggs in this case establishes that matters outside of the settlement agreement were considered by the trial court in reaching its judgment quieting the title.

"It may be conceded for the purpose of this opinion that Jackson Barnett was mentally incompetent and could therefore not execute a valid oil and gas lease. It may also, for the same purpose, be conceded that the court erred in Consolidated Equity No. 216 in concluding that the ratification of the lease by the representatives of Barnett and its approval by the Attorney General and the Secretary of the Interior gave it validity. The fact, however, remains that the court did conclude that all these things that were done made the lease a valid and subsisting oil and gas lease. After a consideration of all these matters, the court entered judgment quieting appellees' title to the lease. The court had jurisdiction of the subject-matter and of the parties to the controversy. Jurisdiction of the subject-matter includes power to determine with binding effect every justiciable issue involved. Such jurisdiction is not limited to deciding issues correctly. *Swift & Co.* v. *United States*, 276 U. S. 311, 48 S. Ct. 311, 72 L. ed. 587. An erroneous decision is just as binding as a correct one if no appeal is taken therefrom.

"Many other reasons are given by appellant why nothing that was done prior to the judgment in Consoli-

dated Equity No. 216, or why nothing done in that case, could give validity to the lease which it is asserted was void *ab initio.* It would serve no useful purpose to engage in a detailed discussion of these various points, because invariably we come back to the fact that the trial court in Consolidated Equity No. 216 concluded and decided that the lease was valid and quieted appellees' title thereto. This judgment became final and is binding upon all parties interested in this lease." (R. 826-827)

Obviously, what the Circuit Court of Appeals meant by "consent decree" is a decree which is merely made and entered *pro forma* upon a compromise agreement or stipulation for decree, without any independent judicial inquiry and determination on the part of the court making and entering the same, and not a decree which, while initiated by an agreement or stipulation, was made and entered, not merely and solely *pro forma* upon the agreement or stipulation, but was made and entered after and pursuant to an independent judicial inquiry and determination on the part of the court making and entering the same with respect to the wisdom and propriety thereof. In 34 C. J., p. 130, Sec. 331, the author says:

> " * * * Where, however, the adjudication is one which is actually made by the court, after due consideration and investigation, although the parties superadd their consent thereto, it is more than a mere contract *in pais,* and is not a judgment by consent."

The burden was upon petitioner to prove his claim that the judgments or decrees which he attacks were merely and solely entered *pro forma* upon the compromise agreement involved herein, without any independent judicial inquiry and determination on the part of the District Court. How-

ever, petitioner only produced one witness in an effort to make such proof, and that witness, who was Mr. John M. Goldsberry, the United States District Attorney at the time of the making and entering of said judgments or decrees, wholly fails to support petitioner. In fact, Mr. Goldsberry destroyed the possibility of any such proof. Notwithstanding the failure of petitioner to sustain his aforesaid burden, respondents produced evidence which definitely and positively controverts petitioner's claim.

Naturally, the evidence bearing upon petitioner's instant claim is not as full, complete and definite as we would wish, because the witnesses were undertaking to testify about something that occurred or did not occur approximately thirteen years prior to the giving of their testimony. But whatever may be said about the evidence with respect to this matter, it cannot possibly be said that there is any evidence that the aforesaid judgments or decrees were merely and solely entered *pro forma* upon the compromise agreement involved herein and without any independent judicial inquiry and determination on the part of the District Court which made and entered the same.

Mr. Goldsberry testified that he recollected being in court at the time of the making and entering of the judgment or decree of July 11, 1929, but his recollection of what took place was hazy; that he thought Judge Diggs, attorney for the Gypsy Oil Company, Mr. Schwabe, one of the attorneys for the next friend and also for the guardian *ad litem* of Jackson Barnett, and Mr. Wills, who represented Mid-Continent Petroleum Corporation, were present; that he didn't r e c a l l whether Mr. Ramsey, who represented Cushing Gasoline Company, was present; that it was his recollection that no witnesses were sworn to testify; that

he could not definitely answer that no evidence of any kind or in any form was presented to the court; that he did not recollect what documentary evidence, if any, was submitted to the court; that he did recall that Judge KENNAMER "had some conversation or some inquiry with Judge Stuart, who was the guardian *ad litem,* and naturally I suppose with the other attorneys who were present"; that he also recollected that the court gave him some instructions with reference to the disposition of the consideration for the settlement; and that all he meant to testify to was that according to his recollection no witness was sworn and examined by the lawyers. (R. 672-677)

Mr. James B. Diggs, who was attorney for the Gypsy Oil Company, testified, as a witness for the respondents, that the judgment or decree of July 11, 1929, was entered in open court; that he was present, and that, according to his recollection, Mr. George S. Ramsey, attorney for the Cushing Gasoline Company, Judge Stuart, the guardian *ad litem,* either Mr. Denton or Mr. Wills, attorneys for the Mid-Continent Petroleum Corporation, Mr. George Schwabe, Mr. Rayburn Foster and Mr. Coakley, attorneys for the next friend and the guardian *ad litem,* were also present; that the compromise agreement, or one of the quadruplicate copies thereof, the letter of approval of Mr. Dixon, Acting Secretary of the Interior, the approval of the Department of Justice, the appointments of Mr. Hall and Mr. McCallon, as guardians of Jackson Barnett, an incompetent, by the County Courts of Creek and Okmulgee Counties, Oklahoma, respectively, were presented to the court; that Mr. Lytle, attorney for H. U. Bartlett, and either Mr. Goldsberry, the United States District Attorney, or Mr. Stivers, his assistant, were also present; that Judge Stuart presented the motion for compromise; that when Judge Stuart presented

same, the court, in substance, remarked: "Should this be approved, or do you agree to it"; that Judge Stuart replied, "under all the circumstances I think that the agreement should be approved"; and that the court inquired of the other attorneys as to whether they thought the settlement should be approved, and that they all indicated they thought so. (R. 677-684)

The first of the judgments or decrees attacked by petitioner is dated June 13, 1929, and appears at page 102 of the record. It is simply entitled "Order," and not Consent or Compromise Order, Judgment or Decree. It recites that the cause came on for hearing upon a petition for approval of the compromise agreement, which petition appears at pages 100-102 of the record. It recites the statements of said petition, that the compromise agreement was submitted to the court for its inspection, that the court had examined the same and had examined the petition for the approval thereof, and that the court was "otherwise sufficiently advised." And in said order it was "ordered, adjudged and decreed that said compromise agreement be, and the same is hereby approved." Said order also ordered that the consideration for said compromise agreement was not to be payable until it was approved by the Secretary of the Interior and the Department of Justice of the United States. Said order concludes with these words: "Done in open court, this 13th day of June, 1929." And, in addition to said order, the District Court, on said 13th day of June, 1929, endorsed his approval upon said compromise agreement. (R. 100-104, 107, 108, and 109)

The second of the judgments or decrees attacked by petitioner, being the only other judgment or decree attacked by him, is dated July 11, 1929, and appears at page 105 of

the record. It is simply entitled "Final Decree," and not Consent or Compromise Order, Judgment or Decree. It recites that the cause came on for hearing upon a regular day of a term of the court; that all of the parties in said cause, including the United States of America, appeared by their counsel; that said compromise agreement had been fully and completely executed, authorized, ratified, confirmed and approved; and that it appeared to the court that it was to the best interest of Jackson Barnett to enter into said compromise agreement. Accordingly, in said final decree, the court again approved and confirmed said compromise agreement, and, pursuant thereto, ordered, adjudged and decreed that petitioner's bill in Cause No. 216 Equity, and the guardian *ad litem's* counterclaim in Cause No. 260 Equity be "dismissed with prejudice," and that the titles of the respective respondents in and to the oil and gas lease involved herein be quieted. (R. 105-107)

The District Court, in its seventh finding of fact, found as follows:

> "Said compromise agreement on the 13th day of June, 1929, was submitted to this court, then presided over by the Honorable FRANKLIN E. KENNAMER, as judge thereof, for approval by the guardian *ad litem* with the statement that the compromise would be to the best interest of Jackson Barnett and with the recommendation that it be approved *and, after hearing evidence therein in open court as to whether the compromise agreement was to the best interest of Jackson Barnett and finding that it would be, the same was approved in open court by the judge thereof,* which approval was conditioned on the approval of the compromise agreement by the Secretary of the Interior and the Attorney General of the United States and on the payment of $35,000.00 to be paid in the manner prescribed in the compromise agreement and by the order

of the court of June 13, 1929. On July 11, 1929, the cause came on further to be heard in open court for final judgment and decree, and all parties being present by their attorneys, the compromise agreement and said cause were submitted to the court for approval and final decree, and it appearing that said compromise agreement had been approved by the Attorney General of the United States and the Secretary of the Interior of the United States, *and the court finding from evidence in open court that such compromise agreement and final decree would be to the best interest of Jackson Barnett,* and it further appearing that the consideration for said agreement had been paid in the manner agreed upon and as directed by the court, the court finally approved said compromise agreement and entered the final decree in such Consolidated Cause No. 216 Equity bearing date of July 11, 1929, quieting the title to these answering defendants or their predecessors in title to the separate parcels of the leasehold estate of which they were owners by deeds of assignment and the judgment was duly entered of record." (R. 619) (Italics ours.)

Thus, we have both the District Court and the Circuit Court of Appeals finding and holding that the judgments or decrees attacked by petitioner were not merely and solely entered *pro forma* upon the compromise agreement involved herein and without any independent judicial inquiry and determination on the part of the District Court which made and entered the same. This dual finding and holding sweeps out from under petitioner the whole and entire factual foundation upon which, in the final analysis, is predicated his petition for *certiorari.*

It is thoroughly established that this court will accept concurrent findings of a District Court and the Circuit Court of Appeals as establishing facts found, and will not grant

a writ of *certiorari* merely to review the evidence or inferences drawn from it. See *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 82 L. ed. 374; *United States* v. *O'Donnell, et al.*, 303 U. S. 501, 82 L. ed. 980; and *General Talking Pictures Corp.* v. *Western Electric Co., Inc., et al.*, 304 U. S. 175, 82 L. ed. 1273. The second and third paragraphs of the syllabus to the last of said cases are as follows:

> "The Supreme Court of the United States will not grant a writ of *certiorari* merely to review the evidence or inferences drawn from it.
>
> "Concurrent findings of both courts below will not be disturbed by the Supreme Court unless plainly without support."

It might not be amiss to call the court's attention to the following evidence appearing in the record:

Respondents' Exhibit 10 was a letter dated June 17, 1929, from A. J. McMillan, Acting Superintendent of the Five Civilized Tribes, to the Commissioner of Indian Affairs, transmitting the compromise agreement involved herein for consideration for approval. In said letter the approval of said compromise agreement was recommended. Said letter contains this statement: "This office has at all times been of the opinion that the lease referred to is, in all respects, a valid lease, and we understand that is the position which your office has taken in this matter." (R. 817-818)

Respondents' Exhibit 2 was a letter dated June 25, 1929, from Jos. M. Dixon, First Assistant Secretary of the Interior, transmitting to the Attorney General of the United States the aforesaid compromise agreement for consideration for approval. In said letter it was stated:

> "This Department believes that the best interests

of Jackson Barnett will be served by the approval of the agreement. However, in view of previous correspondence with your department relative to the case and the matters involved, and of the intervention in the case by the United States in behalf of Jackson Barnett, and of the terms of the compromise agreement, this Department, before acting in the matter of the approval of said compromise agreement, will be pleased to have your advice as to whether you have any objection to the approval of the compromise agreement. If, in your opinion, it is to the best interests of Jackson Barnett and the others concerned that the compromise agreement and settlement be approved, this Department, upon your advice to that effect and the return of the inclosed papers to this Department, will endorse its formal approval upon the compromise agreement." (R. 790-791)

Respondents' Exhibit 3 was a letter, dated June 27, 1929, from William D. Mitchell, Attorney General of the United States, to Ray Lyman Wilbur, Secretary of the Interior, approving the aforesaid compromise agreement. In said letter it was stated:

> "The compromise agreement in settlement of the case-made and entered into by and between the parties plaintiff and parties defendant, and referred to in your letter, has been approved. This accords with the views expressed in your letter. This settlement has been given consideration by this Department, and the opinion has been reached that its approval is for the best interest of Jackson Barnett and the parties concerned." (R. 792)

Respondents' Exhibit 11 consists of certain excerpts from hearings before a sub-committee of the Committee on Indian Affairs, United States Senate, Seventieth Congress, Second Session, pursuant to S. Rep. 79. These excerpts dis-

close that Mr. Pierce Butler, Jr., a Special Assistant to the Attorney General, had on March 2, 1929, made a report of his findings of fact and conclusions of law, together with his recommendations, in connection with various matters involving Jackson Barnett and his properties, and that on March 4, 1929, Mr. Jno. G. Sargent, the then Attorney General, approved said findings of fact, conclusions of law and recommendations. The following are parts of three excerpts from Mr. Butlers' report:

> "It was under this section that Barnett lands were leased and his royalties accumulated. The proper construction of the act is important. Authority to make the Barnett donations was claimed by the Secretary under this act. Officers of the Interior Department in charge of Indian Affairs thought that a decision against the Secretary's authority to approve an incompetent's disposal of his royalties would establish lack of authority to approve an incompetent's oil lease. And promptly after the guardian's appointment was held void a suit was brought in United States District Court, Northern District of Oklahoma, by a self-appointed next friend to cancel the Barnett lease upon the claim that Barnett being incompetent and the appointment of his guardian void, there could be no valid approval of his lease. Many leases might be so attacked. If such leases may be set aside upon proof of the incompetence of the Indian at the date of the lease a vast field of litigation will be opened. Such cases would afford possibilities of great gain and Indians' rights and property of enormous value would depend on the testimony of ignorant and venal persons concerning an Indian's competency at some past time.
>
> * * * * * * * *
>
> "The lease of Barnett was approved by the Secretary and therefore valid whether Barnett was competent or incompetent.
>
> * * * * * * * *

"I advise that:

"*1.* The oil lease of Barnett's allotment is valid." (R. 819-821)

Respondents' Exhibit 9 is the order of the County Court of Creek County, Oklahoma, appointing C. B. McCallon as guardian of the estate of Jackson Barnett. (R. 813-816) The letters of guardianship which were issued pursuant to said order appear at pages 385-386 of the record. Respondents' Exhibit 6 is the petition of C. B. McCallon, as guardian of the estate of Jackson Barnett, to the County Court of Creek County, Oklahoma, for authority to enter into the compromise agreement involved herein, and the order of that court granting such authority. (R. 796-803) Respondents' Exhibit 8 is the order of the County Court of Okmulgee County, Oklahoma, appointing George Riley Hall guardian of the estate of Jackson Barnett. (R. 810-813) The letters of guardianship which were issued pursuant to said order appear at pages 384-385 of the record. Respondents' Exhibit 7 is the petition of George Riley Hall, as guardian of the estate of Jackson Barnett, to the County Court of Okmulgee County, Oklahoma, for authority to enter into said compromise agreement, and the order of that court granting such authority. (R. 803-809)

It is quite apparent that petitioner's basic reliance is upon those cases which hold that an *infant* or *mentally incompetent person* is not bound by a judgment or decree rendered against him upon the mere consent or stipulation of his *parent, next friend, guardian,* or *guardian ad litem,* and without the judicial sanction of the court. However, the most that such cases hold is that a court cannot enter a valid judgment or decree against a minor or a mentally incompetent person merely upon the consent or stipulation of

the minor's or the incompetent person's *parent, next friend, guardian,* or *guardian ad litem,* and it must in some way ascertain and conclude for itself that the judgment or decree is for the best interest of the minor or mentally incompetent person. None of said cases prescribe any exact or definite procedure by which the court must arrive at such ascertainment and conclusion, or hold that there must be a trial of the case or that witnesses must be sworn and their testimony given. All that is required is that the court, for itself, determine whether a judgment agreed to is reasonable and proper and for the best interest of the minor or mentally incompetent person; and this, according to the evidence of both petitioner and respondents, the District Court herein did before making and entering the judgments or decrees under attack. Moreover, under the evidence before the District Court, that court most certainly would not have been justified in concluding that any particular prerequisite to the rendition of said judgments or decrees was omitted.

If it were a condition precedent to the entry of a judgment for or against a minor or mentally incompetent person pursuant to a compromise agreement, that the court have witnesses sworn, their testimony presented, and determine the merits of the issues involved, as upon an ordinary trial, the same would render settlement by agreement of litigation to which such persons were parties practically impossible. Because, if the court, perchance, were of the opinion that the minor or mentally incompetent person should prevail, it could not reasonably and in good conscience approve of any judgment to the contrary, and, if, perchance, it were of the opposite opinion, good morals would preclude it from being a party to paying a consideration in settlement of an unfounded action. As we have hereinbefore stated, none of the authorities support the assertion or

claim of any such condition precedent, and respondents maintain that petitioner's contention for the application of any such condition is quite unreasonable, if not ridiculous.

In the case of *Thompson* v. *Maxwell Land Grant & R. Co.*, 168 U. S. 451, 42 L. ed. 539, decided in 1897 and which has been since said time, and still is, the leading case on the subject involved, this court said:

> "That infants are bound by a consent decree is affirmed by the authorities, and this notwithstanding that it does not appear that a prior inquiry was made by the court as to whether it was for their benefit. In 1 Dan. Ch. Pl. & Pr. 163, it is said:
>
> > 'Although the court does not usually, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit; and in the same manner an order for maintenance, though usually made after an inquiry, if made without, would be equally binding.' (In support of these propositions many authorities are cited in a note.) 'An infant defendant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it; such as fraud, collusion, or error.'
>
> "In *Walsh* v. *Walsh*, 116 Mass. 377 (17 Am. Rep. 162), a decree had been entered as follows: 'And the plaintiff and the defendants, * * * Thomas Keyes, * * * and also in his capacity of guardian *ad litem* of Bridget Walsh and William Walsh, consenting to the following decree; and this court being satisfied upon the repre-

sentations of counsel that the decree is fit and proper to be made as against the said Bridget and William; it is thereupon ordered and adjudged and decreed,' etc. On a bill of review filed by the minors this decree was challenged, among other reasons, on the ground that it appeared to have been made by consent of their guardian *ad litem* and upon the representations of counsel without proof. The court decided against the contention, and speaking in reference thereto, through Mr. Chief Justice GRAY, said:

> 'An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. *Tillotson* v. *Hargrave*, 3 Madd. 494; *Levy* v. *Levy*, Id. 245. And a compromise, appearing to the court to be for the benefit of an infant, will be confirmed without a reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. *Lippiat* v. *Holley*, 1 Beav. 423; *Brooks* v. *Lord Mostyn*, 33 Beav. 457, and 2 De G. J. & S. 373.
>
> 'If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. *Wall* v. *Bushby*, 1 Bro. Ch. 484; 1 Dan. Ch. Pl. & Pr. 164. The case falls within the general rule, that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal, or review. *Webb* v. *Webb*, 3 Swanst. 658; *Harrison* v. *Rumsey*, 2 Ves. Sr. 488; *Bradish* v. *Gee*, 1 Ambl. 229; *s. c.*, 1 Kenyon K. B. 73; *Downing* v. *Cage*, 1 Eq. Cas. Abr. 165; *Toder* v. *Sansam*, 1 Bro. P. C. 468; *French* v. *Shotwell*, 5 Johns. Ch. 555.'

"Ordinarily, indeed, a court before entering a con-

sent decree will inquire whether the terms of it are for the interest of the infants. It ought in all such cases to make the inquiry, and because it is its duty so to do it will be presumed, in the absence of any showing to the contrary, that it has performed its duty. In this case, while the decree fails to recite the making of such an inquiry, there is nothing to indicate that it was not made; the circumstances tend strongly to show that it was in fact made, and the finding is that the conclusion reached by the chancellor as to the advisabilitiy of the settlement was a sound exercise of his discretion. It is true the findings show that this decree of September, 1866, was not made by the personal procurement, knowledge, or consent of said Scheurick or Guadalupe Bent, and the fact of the entry thereof was unknown to them for several years thereafter. They also show that there is no pleading, order, or proceeding of record disclosing whether or not any inquiry was made by the court; but it does appear that the parties plaintiff, including the infants, were represented by counsel; that the guardiain *ad litem* as well as the other adult plaintiffs fully understood the settlement and assented to it; and it is not strange that, having executed conveyances, they left to counsel such further action as should be deemed necessary to perfect the transfer of title. Further, in April prior to this decree, not only was the suit revived in the name of the infant heirs of Charles Bent, but on motion of the solicitors for plaintiffs their mother was appointed guardian *ad litem* and commissioner in chancery, with full power to execute deeds and carry into execution all sales or transfers of their interest in the real estate described to the defendant Maxwell. The court was therefore early advised of the fact of a proposed settlement. The consent decree shows fully the terms of the settlement, and it certainly is not straining the presumption in favor of judicial action to assume that the court would not have permitted the entry of this decree, providing for a settlement whose

terms were thus disclosed, without being satisfied that such settlement was for the interest of the minors who were under its charge.

* * * * * * * *

"It would be strange, indeed, if, when those authorized to represent minors, acting in good faith, make a settlement of claims in their behalf, and such settlement is submitted to the proper tribunal, and after examination by that tribunal is found to be advantageous to the minors and approved by a decree entered of record, such settlement and decree can thereafter be set aside and held for naught on the ground that subsequent disclosures and changed conditions make it obvious that the settlement was not in fact for the interests of the minors, and that it would have been better for them to have retained rather than compromised their claims. If such a rule ever comes to be recognized it will work injury rather than benefit to the interests of minors, for no one will make any settlement of such claims for fear that it may thereafter be repudiated. The best interests of minors require that things that are done in their behalf, honestly, fairly, upon proper investigation, and with the approval of the appropriate tribunal, shall be held as binding upon them as similar actions taken by adults."

Almost no end of cases to the same effect could be cited.

A consent decree is a judicial act as held in *Pope* v. *United States*, No. 26, decided November 6, 1944. Therein this court said:

"It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is 'a judicial act.' *United States* v. *Swift*, 286 U. S. 106, 115; *Swift* v. *United States*, 276 U. S. 311; see also *Pacific R. R.* v. *Ketchum*, 101 U. S. 289; *United States* v. *Babbitt*, 104 U. S. 767; *Nashville, Chattanooga & St. Louis Ry.* v. *United States*, 113 U.

S. 261; *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451. It is likewise a judicial act to give judgment on a legal obligation which the court finds to be established by stipulated facts; *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 333; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 388; *Equitable Society* v. *Comm'r*, 321 U. S. 560, 561; or when the defendant is in default. *Voorhees* v. *Bank of the United States*, 10 Pet. 449; *Randolph* v. *Barrett*, 16 Pet. 138; *Clements* v. *Berry*, 11 How. 398; *Cooper* v. *Reynolds*, 10 Wall. 308; *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603; *Fidelity and Deposit Co.* v. *United States*, 187 U. S. 315; *Christianson* v. *King County*, 239 U. S. 356, 372. It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly. *Renner and Bussard* v. *Marshall*, 1 Wheat. 215; *Aurora City* v. *West*, 7 Wall. 82, 104; *Clements* v. *Berry, supra;* cf. *Mayhew* v. *Thatcher*, 6 Wheat. 129. In all these cases the court determines that the unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment."

Even if the validity of the judgments or decrees under attack depended upon the introduction of some evidence as to the issues involved, the merits thereof, and as to whether said judgments or decrees were in the best interests of Jackson Barnett, such evidence can be found in the compromise agreement involved herein, which, according to the record was introduced in evidence, and which contained a recitation of all the matters involved in greater and more accurate detail than could have been given by any sworn witness, or witnesses, and also in the statements which said record discloses were made to the court by counsel immedi-

ately preceding the rendition of said judgments or decrees. (R. 772-789, 672-684, 619)

Finally, we would call attention to the fact that whatever may be said about a compromise decree against an *infant* or *mentally incompetent person* when he is represented solely and exclusively by his *parent, next friend, guardian,* or *guardian ad litem,* we are not confronted solely with any such situation. Here we have a situation in which Jackson Barnett, in addition to being represented by a next friend and a guardian *ad litem,* was represented, whether wisely or not is immaterial, by the United States and by two Oklahoma probate court guardians; and the United States, by its Secretary of the Interior and its Attorney General (R. 771-772), and said two probate court guardians, after having been regularly authorized so to do by the respective probate courts which appointed them (R. 786, 796-809), consented and agreed to the judgments or decrees under attack. And in this situation, the District Court herein was not required to conduct any trial, hear any evidence, or even ascertain and conclude, for itself, which, however, it did do, that such judgments or decrees were for the best interests of Jackson Barnett.

The reasoning of those cases which hold that it takes more than the consent, agreement or stipulation of a *parent, next friend, guardian* or *guardian ad litem* of a minor or a person mentally incompetent to render a judgment or decree *res adjudicata* against the minor or mentally incompetent person is that such representatives are *per se* without power or capacity to make any admission, waiver, prejudice, representation or agreement whatsoever. However, it is well established, by this and all other courts which have had any occasion to consider the matter, that the United States, as

guardian of a restricted Indian, has the superior right and power to commence, maintain and control litigation in connection with the allotment of such Indian, and that it may compromise and settle such litigation or dismiss the same, even with prejudice, or refuse to appeal from any judgment against it in such litigation, and that its action in these respects cannot be objected to, interfered with, or circumvented by such Indian, his next friend, his guardian, guardian *ad litem*, or any other party or parties. Consequently, the District Court, had it seen fit so to do, could have made and entered the judgments or decrees under attack *merely and solely upon approval and execution of the compromise agreement herein by the United States*, acting by and through its Secretary of the Interior and its Attorney General, and *without any judicial ascertainment or determination whatsoever.*

In the case of *Conner, et al.*, v. *Cornell, et al.*, (C. C. A. 8) 32 F. (2d) 581, the court said:

> "It is argued that Abbie Conner and Nettie Conner were not parties to the action brought by the United States in the federal court, and hence are not bound by its action. This is unavailing, and, in referring to the claim that the Indian wards had not been made parties in *Heckman* v. *United States*, 224 U. S. 413, 444, 32 S. Ct. 424 (56 L. ed. 820), the Supreme Court said: 'This position is wholly untenable. There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents —whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indian's acquiescence. *It does not rest upon convention, nor is it circumscribed by rules which govern private relations.* It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its

care, and it recognizes no limitations that are inconsistent with the discharge of the national duty. When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the Government was in court on their behalf. *Their presence as parties could not add to, or detract from the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances.* * * * *And it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question'.*" (Italics ours.)

In the case of *Mars, et al.*, v. *McDougal, et al.*, (C. C. A. 10) 40 F. (2d) 247, this court said:

"Counsel for appellants contend that the decree in cause No. 3191 is not *res adjudicata* for the reason that the United States was without authority to bring an action in behalf of Lusanna Brink and then *dismiss it with prejudice*, without receiving some consideration for such dismissal.

"It is well settled that the United States, as guardian of its Indian wards, may maintain a suit in its name to enforce restrictions upon the alienation of lands by such Indians and to set aside conveyances or contracts by which such restrictions have been transgressed. *LaMotte* v. *United States*, 254 U. S. 570, 41 S. Ct. 204, 65 L. ed. 410; *United States* v. *Noble*, 237 U. S. 74, 35 S. Ct. 532, 59 L. ed. 844; *Heckman* v. *United States*, 224 U. S. 413, 32 S. Ct. 424, 56 L. ed. 820; *Bowling & Miami Inv. Co.* v. *United States*, 233 U. S. 528, 34 S. Ct. 659, 58 L. ed. 1080.

"Since the United States, acting through its At-

torney General, has the power to maintain such a suit, *it would be a strange situation, indeed, if the Attorney General could not dismiss such suit, with prejudice upon discovery that it was groundless.* We conclude that power is vested in the Attorney General, as the head of the department of justice, to initiate, control and dismiss such a suit. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 281, 8 S. Ct. 850, 31 L. ed. 747; *United States* v. *Throckmorton*, 98 U. S. 61, 70, 25 L. ed. 93; *United States* v. *Beebe*, 127 U. S. 338, 342, 8 S. Ct. 1083, 32 L. ed. 121.

"A dismissal with prejudice is a decision on the merits and is a bar to a further action, under the doctrine of *res adjudicata. Conner* v. *Cornell*, (C. C. A. 8) 32 F. (2d) 581; *Ledbetter* v. *Wesley*, (C. C. A. 8) 23 F. (2d) 81; *Hickey* v. *Johnson*, (C. C. A.) 9 F. (2d) 498." (Italics ours.)

See, to the same effect, *Vinson, et al.*, v. *Graham, et al.*, (C. C. A. 10) 44 F. (2d) 972; *Pueblo of Picuris in State of New Mexico* v. *Abeyta, et al.*, (C. C. A. 10) 50 F. (2d) 12; *Harjo, et al.*, v. *Empire Gas & Fuel Co.*, (C. C. A. 8) 28 F. (2d) 596; *United States* v. *Dunn, et al.*, (C. C. A. 8) 288 Fed. 158; and *United States* v. *Candelaria, et al.*, 271 U. S. 432, 70 L. ed. 1023.

With respect to the power of the District Court to make and enter the judgments or decrees under attack upon the consent of the above referred to two Oklahoma probate court guardians, after they had been regularly authorized so to do by the respective probate courts which appointed them, we would call the court's attention to *Verdine, et al.*, v. *Cosden & Co., et al.*, 96 Okl. 52, 220 Pac. 329, in which the court said:

"We deem it unnecessary to go into the discussion of the facts out of which this litigation grew or

the assignments of error made by the plaintiffs in error, for that the plaintiffs in error, with the approval of the County Court having the jurisdiction of the settlement of their estate and their guardians, joined by their counsel, for a sum of money specified, have entered into an agreement satisfactory to the respective parties. *Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. ed. 539; *Gusdofer* v. *Grundy*, 72 Miss. 312, 16 So. 432; *Cannor* v. *Hemphill*, 7 Tex. 184. Without regard to the merits, we are of the opinion that the settlement is to the best interest of the minors and that the motion to affirm the judgment of the trial court should be sustained and the judgment of the trial court should be affirmed."

See, to the same effect, *Carter Oil Co.* v. *Fleming*, 117 Okl. 39, 245 Pac. 833; *Harris* v. *Davis, et al.*, 170 Okl. 35, 38 P. (2d) 562; and *Derrisaw* v. *Schaffer, et al.*, (D. C., E. D. Okla.) 8 Fed. Supp. 876.

Respondents respectfully submit that the opinion of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals on the same matter; or that said opinion decided any question of local law in a way probably in conflict with any applicable local decisions; or decided any question of federal law which has not been, but should be, settled by this court; or decided any federal question in a way probably in conflict with applicable decisions of this court; or departed from the accepted and usual course of judicial proceedings, or sanctioned any such departure by the District Court; and respondents further submit that no reason exists for the grant-

ing of petitioner's petition for a writ of *certiorari*, and that such petition should be denied.

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JAMES B. DIGGS, JR.,
Counsel for Respondents, Gypsy Oil Company and Gulf Oil Corporation.

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No. 692

In the Supreme Court of the United States

October Term, 1944.

JAMES T. SPENCER, ADMINISTRATOR OF THE ESTATE OF JACKSON BARNETT,
Petitioner,

vs.

GYPSY OIL COMPANY, A CORPORATION; GULF OIL COMPANY, A CORPORATION; F. A. GILLESPIE, *ET AL., Respondents.*

Reply of Petitioner to Brief of Respondents

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REPLY OF PETITIONER TO BRIEF OF RESPONDENTS.

In taking up the response to the petition herein, we find respondents referring to the withdrawal of the intervening petition of the United States, and ascribing as a ground for its withdrawal, the following, on page 1 of their brief:

> "The United States which, for a time, was a party to this action, obviously concluded that there was no merit in petitioner's claims, and that the same were untenable. On February 20, 1939, about three months after the commencement of the action, the United States intervened therein, and took a position on behalf of petitioner, or in accord with his claims. [2] Thereafter, pursuant to a pre-trial conference, the United States filed a brief in support of the admissibility, upon the trial of the case, of evidence as to the alleged mental

incompetency of Jackson Barnett on March 5th, 1912—the date of the execution of the oil and gas lease involved herein. Thereafter, the District Court advised the parties that, upon the trial of the case, it would hold such evidence inadmissible. Thereafter, on June 26, 1942, the United States moved for, and was granted leave to, withdraw its complaint in intervention, and thereby abandoned petitioner. (R. 614-616) Subsequently, the District Court, and later the Circuit Court of Appeals, held petitioner's claims were without merit and untenable. Apparently, petitioner's strategy is that constant and repeated reiteration of his claim might, somehow, somewhere, or at some time, eventuate in their adoption."

Again, on page 6, reference is made to the attitude and position of the United States, in its intervention and withdrawal, and the following language is used:

> "As we have heretofore seen that the United States, evidently realizing there existed no ground or grounds justifying the vacation of said judgments or decrees, withdrew from the case. (R. 614-616)"

The foregoing recitals have no place in this response, in determining the right of petitioner to a writ of *certiorari* and a review in this Court of the judgment of the Circuit Court of Appeals in this cause, and this Court should disregard the ungrounded assumption that its withdrawal referred to was due to "a conclusion that there was no merit in petitioner's claims, and that the same were untenable."

In this connection, counsel for petitioner asserts that no such conclusion was claimed or asserted by the United States, as a ground for its withdrawal. Indeed, no ground was asserted or claimed as its reason for withdrawal. Its withdrawal is marked by the unusual fact and circumstance that, after four years of collaboration with petitioner in his

suit and in the prosecution of its intervention, by briefs and oral arguments, its withdrawal was made upon a telegraphic request to the United States Attorney—without assigning any ground or reason—to withdraw said intervening petition, and without notice or consultation with counsel for petitioner, or the United States District Attorney in charge of said cause, said withdrawal being two days before said cause was set upon the trial docket for hearing.

Whatever may have been the reason for its withdrawal does not in any way change or affect the right of petitioner herein to a writ of *certiorari*, and a review of the judgment of the Circuit Court of Appeals.

The record facts, and the judgment of the Circuit Court of Appeals, determines in this Court the fate of petitioner in his struggle to have this cause reviewed, and not what the United States did, or whatever reason it had for doing it.

There is nothing in this record touching the withdrawal of the United States from this case which discloses any reason for its action. But the record does suggest a sounder basis for an inference than that advanced by respondents.

The United States intervened in the original litigation, ostensibly as the guardian of Jackson Barnett, but, in fact, as an adversary, aiding the oil companies who were resisting his claims. And it did not intervene therein wholly on its own motion. It came in at the insistence of counsel for one of the oil companies. Petitioner here calls attention to a part of the correspondence. (R. 726-727) Mr. Andrew Mellon who arranged for the interview of Judge Diggs with the Attorney General, was then a co-member of the President's cabinet and a member of the board of directors of the Gulf Oil Corporation (R. 163), all but a few shares of the Gypsy Oil Company were owned by the Gulf Oil

Corporation. The record also contains the letter of Judge Diggs to the Secretary of the Interior, urging that he request the Attorney General to enter that litigation (R. 715-722),

> "* * * for the purpose of assisting in upholding and sustaining said oil and gas lease, and the action of the Department in regard thereto,"

which amounts to a direct request that the United States, in the guise of its assumed guardianship, oppose the claims of its ward. This, the United States consented to do, and did do.

In all the history of litigation involving the Indian and his rights, there is not to be found another case where the Government, acting as guardian, thus actively opposed the rights of the Indian.

The sudden and unexplained withdrawal of the United States from this proceeding may well have been influenced by its previous action. Such inference is more reasonable than the one advanced by respondents.

The petitioner herein asserts that, upon the record facts disclosed in his petition, the judgment of the Circuit Court of Appeals determining against the rights of this old Indian to property worth millions of dollars was in *conflict* with, and violates the decisions of this Court and of the Circuit Court of Appeals of the Tenth Circuit, and like decisions of the Circuit Court of Appeals of the Eighth Circuit; and decisions of the Fifth Circuit Court of Appeals; and the decisions of the highest court of Oklahoma, in a score of cases determinative of the law fixing the ownership and rights of property of this Indian.

If this Court is to consider, as an element in this matter, the participation in this suit of the United States, and its subsequent withdrawal, then it should not do so except

upon a review by this Court of the judgment of the Circuit Court of Appeals, after granting a writ of *certiorari*, and upon a full hearing of the case.

Another question urged by respondents in their brief, to which we wish to call attention, is set out on page 5, where respondents use the following language:

> "In so far as this action is concerned, petitioner is, in a sense, a mere interloper, because he is merely prosecuting this action as administrator of the estate of Jackson Barnett, the full-blood Creek Indian involved herein, and because the subject-matter of this action, being restricted Indian property, is not property subject to administration by any probate court of Oklahoma. Petitioner has no duty, with respect to such property, and his interest is not hard to see. Such interest is not wholly charitable. The proper parties to maintain this action are the United States, or the heirs of Jackson Barnett."

Again, respondents seek to drag into the issue here, a matter which was not decided by the Circuit Court of Appeals, and upon which decision it rested its judgment.

The question of the capacity to sue in this action was not determined in the Circuit Court of Appeals, *as the basis of its affirmance of the lower court*. That court, by its decision, by implication, and necessary deduction, refused to affirm the lower court, upon that ground.

In the shaping of the issues to be raised upon the petition for *certiorari*, it is apparent that the only question brought before this Court for consideration by the petition was, whether or not the decree was, as contended by the petitioner, a "consent decree," or as concluded by the Circuit Court of Appeals, in its decision, an adjudication upon the merits of the consolidated action. It is so clearly ap-

parent that this Court, before it may pass upon the question of capacity to sue, should bring the entire record before it for review, and to that end, this Court should consider the statements of counsel, as a request that the writ issue herein.

This action is in the nature of an *ancillary suit*, to vacate and remove the consent judgment which stands in the way of a trial of Consolidated Action No. 216-Equity, upon the merits thereof, which the consent judgment prevented being done.

It is the statutory duty of the administrator to marshal all assets of estate and preserve same for the benefit of the heirs. (See Secs. 1193 to 1196 of Oklahoma Statutes 1931.)

At the time this action was begun (Nov. 2, 1938), the question as to who are the legal heirs of Jackson Barnett, had not been determined, and was not until March, 1942, when this Court refused *certiorari* in the heirship case. The respondents had assailed, in April, 1939, the right of both the United States and petitioner to maintain the suit and, at that time, respondents were also pleading the Oklahoma Statutes of Limitations against both the intervening petition of the United States and of petitioner herein. (R. 302-303 to 319-421-438)

The United States District Court, at Tulsa, at that time had held that it was the duty of an administrator of the estates of deceased, restricted Indians, to bring actions for oil wrongfully removed from the Indian's restricted lands. *Simon* v. *Schaffer*, 11 Fed. Supp. 450. And the Circuit Court of Appeals of the Tenth Circuit had followed decisions of the Oklahoma Supreme Court and, upon its own rule, sustaining the capacity of the administrator to

sue in cases similar in principle to this one, and involving restricted Indian property.

In re Thompson's Estate, 179 Okl. 240, 65 P. (2d) 442;
Hardridge v. *Hardridge*, 168 Okl. 7, 31 P. (2d) 589;
United States v. *Bond*, 108 F. (2d) 594;
State, ex rel. Murray, v. *Pure Oil Co.*, 189 Okl. 507, 37 P. (2d) 608;
Caesar v. *Burgess*, 103 F. (2d) 503;
Forrester v. *So. Pac. Co.*, 134 Pac. 753;
Kendall, Adm'r, v. *Ewert*, 66 L. ed. 862-867.

It is not a pleasant duty for counsel for petitioner to feel compelled to characterize the reference to petitioner as "an interloper," and to attempt to impugn the good faith and purpose of this action as unethical and without foundation.

That implication is intended, no doubt, to prejudice the minds of this Court against petitioner and his cause, and likewise, against the County Court which appointed him as administrator of said estate, and which directed him to enter and prosecute this action to a final judgment in the interest of, and for the benefit of, the legal heirs of this unfortunate old Indian.

Such statement as respondents have taken the liberty to insert has no place in this proceeding, and should be stricken from such response. It reflects no credit to respondents' efforts herein, they, who have stripped this old Indian and his heirs of seven-eights of all his great wealth by the very acts complained of in petitioner's suit herein.

It is a remarkable fact that respondents, nowhere in their brief, attempt to point out any error in petitioner's claim that there is a clear and unquestionable conflict between the "consent decree" here involved, and the de-

cisions of this Court, of the Circuit Court of Appeals for the Eight and Tenth Circuits, and, in principle, of the Fifth Circuit, and the highest court of the State of Oklahoma, in the many cases cited and referred to in the petition, which go to the very heart of the question here. And it is apparent, counsel cannot point to a single case where such conflict does not exist, notwithstanding they have, in general terms, asserted there is no conflict. (See petition—Reason for Granting Writ, pp. 15-16-17-18-19-20, and foot-notes.)

On page 2 of their brief respondents say:

> "Petitioner seems unable to resist making inaccurate statements of fact, or qualifying same to fit the law, and *vice versa*, but in spite of indulgence in this field, he winds up with misfits."

This is followed by five examples of what they assume to refer to in the above remark:

Their first example is that petitioner has repeatedly asserted that it is admitted by respondents that, on March 5, 1912, the date of the execution of his oil and gas lease, Jackson Barnett was mentally incompetent.

We assert that, nowhere has petitioner made any such statement, but petitioner did state, and now repeats the assertion, that the Circuit Court of Appeals, in its opinion, concedes the mental incompetency of Jackson Barnett on the date he signed the oil and gas lease, and that he was then incompetent to execute it. (See petition, p. 23, foot-note 11.)

This admission by the Circuit Court of Appeals was based upon several decisions of the courts, including the decisions in the cases of

Mott v. *United States*, 283 U. S. 747, 75 L. ed. 1385;

United States v. *Equitable Trust Co.*, 283 U. S. 738, 75 L. ed. 1379 (decided by this Court);
United States v. *Mott*, (C. C. A., 10th Cir.) 37 F. (2d) 860;
United States v. *Anna Laura Barnett, et al.*, 82 F. (2d) 765;
Barnett, Incomp., v. *Equitable Trust Co.*, 21 F. (2d) 325;

and other cases.

So firmly was this concession made by the Circuit Court of Appeals that it also conceded in its opinion, that the judgment entered by the trial court, in Consolidated Equity No. 216, was an erroneous judgment (foot-note 11).

On page 3, paragraph 2, of respondents' brief, respondents charge: That petitioner has repeatedly asserted that respondents have admitted that "The aforesaid decrees were void and invalid."

No such statement can be found in the petition.

However, petitioner does state that this concession was made by the Circuit Court of Appeals (see foot-note 11, p. 23 of petition).

The third example cited on page 3 of respondents' brief, charges that: "Petitioner repeatedly asserts that it is admitted (by respondents) that the oil and gas lease was void and invalid." Counsel do not point out any such statement in the petition.

But petitioner now asserts that, the Circuit Court of Appeals admitted, as a matter of law, based upon the incompetency of Jackson Barnett, to execute the lease, that the same was "void." (See same foot-note.)

The fourth example cited on the same page of respondents' brief is the charge that, petitioner has repeatedly as-

serted "that it is admitted that the afoersaid judgments or decrees were and are merely and solely 'consent decrees or judgments' entered merely and solely, *pro forma*, upon the compromise agreement involved herein, and without any judicial inquiry and determination on the part of the District Court which made and entered the same."

Whatever may be said as to its meaning and effect, petitioner has charged and asserted, and now re-affirms the statement that respondents, as one of their defenses to petitioner's action, has pleaded that said decree was a "consent decree"—entered upon a compromise agreement by the representatives of Barnett and the oil companies, and because it was a consent decree, the same could not be assailed in the manner and form the same was assailed in petitioner's suit.

This defense was repeatedly pleaded and asserted by respondents and by this pleading, respondents conclusively characterized the decree as being one entered *pro forma* upon a compromise agreement. (See petition and brief, p. 24, foot-note 12.) Quoting from the answer of respondents. (See also, R. 444, par. 9, answer; p. 502, par. 12, ans.)

These admissions and contentions by respondents were made at a time when there was no reason for asserting the contrary, as they are now doing. They knew then, that there was nothing but a *pro forma* approval by the Court upon the compromise agreement and that there was no trial or hearing, nor consideration of any evidence of any kind or character, in support of any issue involved in the litigation compromised.

On page 4, in example 5, referred to in the brief of respondents, petitioner concedes that he has repeatedly asserted, that the Circuit Court of Appeals, "in its opinion

conceded, that Jackson Barnett was mentally incompetent on March 5, 1912; and that the oil and gas lease involved herein was and is void," and that such assertions constituted only partial truth.

Petitioner denies that such assertions constituted only partial truth.

Respondents' statement which then follows, "that the only concessions made by the Circuit Court of Appeals were 'for the purpose of this opinion.' (Rec., p. 827.)"—dose not alter the effect of said concessions, nor the truth of the matters conceded.

It is characteristic of respondents to seek to avoid the force and effect of said concessions because of the consequent disaster to their defense which follows upon those conceded facts. And it was for this very reason that they did not permit said action to go to trial upon the merits.

The concession of Barnett's mental incompetency, at the time he executed the lease, as we have before asserted, was established as a judicial fact, in a dozen courts, and in the Circuit Court of Appeals in which the opinion in this case was written. And, to say that the concession was "for the purpose of its opinion," could have no consideration as a challenge to the correctness of the concession.

The foregoing "five examples of erroneous statements" made by petitioner, as charged in respondents' brief, constitute all of such statements pointed out.

Yet, on page 5 of said brief, respondents again violate the rule that, where erroneous statements are charged each must be clearly pointed out, else such charge will be disregarded.

Counsel's argument (brief, pp. 3-4) that the compromise

agreement was but the initiation of the decrees later entered, and was not the sole basis of such decrees, *is fallacious.*

It is not contended, and indeed could not be, that the compromise agreement was not complete in itself; that as approved by the court, it embodied all the terms of the agreement for the settlement of the claims advanced by the parties. None of the terms of the agreement were modified by any of the provisions of the decree. The court could not have entered decrees which did not give full effect to its approved agreement of the parties, had it been disposed to do so.

Speaking of the character and effect of such agreements and decrees, the court in the case of *American Radium Co.* v. *Hipp. Didisheim Co., Inc.,* 279 Fed. 601-603, said:

> "They are to be read within their four corners, and especially so, because they represent the agreement of the parties, and not the independent examination of the subject-matter by the court. Neither court, nor party, can write in them what is not there, and thus change what was agreed upon between the parties."

Here the parties had agreed upon all the matters which were to constitute a full settlement of the subject-matter of the litigation. This agreement had been submitted to and approved by the court. No fact relating to the subject-matter was thereafter open to investigation. Nor could the court have opened the way to such investigation, so long as its approval of the compromise agreement was in effect. This, of itself, placed the subject-matter of the litigation beyond the reach of investigation by either the parties or the court. Any investigation thereafter attempted could not have been directed to anything concerning the subject-matter of the suit. All questions as to the propriety or ad-

visability of entering a decree consistent with the compromise agreement were eliminated by the acts of the parties. In approving the compromise agreement the court annexed the condition that it be approved by the Attorney General and by the Secretary of the Interior. It was proper for the court to make such investigation as satisfied him the condition had been met before entering its decree, but this did not involve the investigation of any fact connected with the subject-matter of the litigation. All this had been settled by the compromise agreement. The compromise agreement was not, therefore, merely the initiation of the decrees based thereon. It was the sole basis of the decree.

After the parties have agreed to the terms of settlement of an action before a court, the only function of the court is to carry the agreement into effect by a decree in accord with the agreement. The settlement is the act of the parties, and not the court.

—*Ellis* v. *Ellis*, 193 N. C. 216, 136 S. E. 350;
Carpenter, et ux., v. *Carpenter*, 213 N. C. 36, 195 S. E. 5, 7.

The compromise agreement of itself is an express consent of all the parties to the entry of a decree, without a judicial investigation or determination of any questions of fact raised by the pleadings.

> "Consent excuses error, and ends all contention of the patries. It leaves nothing for the court to do but to enter what the parties have agreed upon, and when so entered, the parties themselves are concluded."
>
> —*Schmidt* v. *Oregon Gold Min. Co.*, 28 Ore. 9, 40 Pac. 1014.

And where a judgment is rendered upon an agreement of the parties, the judgment puts an end to the agreement,

and the party in whose favor the judgment runs is estopped from saying it does not carry out the terms of the agreement.

—*State Bank* v. *Young,* 2 Ind. 171, 52 Am. Dec. 501.

An agreement which fixes the terms of the decree to be entered, fixes the character of such decree. Where parties competent to contract agree to the entry of a decree, settling any claims which are the subject-matter of litigation, a decree based on such agreement is a "consent decree" and not a judicial determination of the rights of the parties. Such decree is merely the record of the agreement of the parties.

—*Heyman* v. *O'Connell,* 13 N. E. 210, 293 Ill. App. 634.

The mere fact that the record of a purported agreement is evidenced by the entry of a decree conforming thereto does not validate an agreement, as against a party to it who was *incompetent* to enter into it. If Jackson Barnett was incompetent at the time those purporting to represent him attempted to bind him by an agreement they were without authority to make, the mere fact such agreement is evidenced by a consent decree, cannot operate to give it validity.

The substance of the compromise agreement is to the effect that, regardless of any question as to the validity of the oil and gas lease, and without any judicial inquiry into or determination of its validity there should be a present ratification and confirmation of it, and a decree should be entered to that effect. Such a decree had no greater effect than the terms of the agreement of the parties. Unless the agreement was binding upon Jackson Barnett the decree could not be. The court had no power to do for the parties what they could not do for themselves. By its decrees it merely sanctioned and judicially recorded what they attempted to do.

The conclusion of respondents that the decrees were not entered until

> " * * * the District Court had made all necessary independent judicial inquiry and determination to render and constitute said judgments and decrees *res adjudicata* of both issues of law and fact involved in the case or cases, in which the same were made and entered,"

is *erroneous,* as a matter of law. When the compromise agreement was submitted to it, the court had either to approve and accept it as the *sole* basis of the decree to be entered, or to decline to accept. Unless it rejected the agreement, it could not put the parties to proof of any of the issues raised. When approved nothing remained for judicial investigation.

The testimony, so-called, of Mr. Goldesberry and Mr. Diggs, referred to by respondents at pages 11 and 12 of their brief (set out in the appendix here), could not have been directed to any fact or facts related to the subject-matter of the litigation, for investigation into this, had been foreclosed by the approved compromise agreement. The agreement was intended to, and, if valid, did settle every issue presented, but without any judicial inquiry into or determination of any fact or facts upon which the correctness or binding effect of the decrees depended, as a matter of law. It is specious to argue that the informal action of the court, evidenced by the statements of Judge Diggs and Mr. Goldesberry, amounted to an "independent examination" of the subject-matter.

This proceeds upon an erroneous assumption. Nowhere in the agreement is there any reference to the pivotal fact upon which the validity of the lease depended—namely, the *competency, or capacity of Jackson Barnett to execute it.*

The issue presented was, the invalidity of an oil and gas lease of an incompetent, restricted Creek Indian, and this depended upon whether Jackson Barnett had capacity to make it.

The question, whether an attempted ratification of it might be in the interest of Jackson Barnett, was no part of the subject-matter which the court was required to adjudicate; though it might have been a matter proper to be considered in approving or rejecting the compromise agreement. Nor would such conclusion, reached without inquiry as to the controlling facts, and supported only by an agreement upon other facts, sustain a decree based thereon; and the observations of the court below, that

> "It follows, therefore, that when the Court made its examination of the issues, it had before it all the facts and questions of law set out in the agreement,"

if advanced as a reason why the decree was not a "consent decree," is patently *erroneous*. Had the agreement embodied, as the Court says it did, the facts and conclusions of law, the Court had only to look to the agreement. When it approved this, it accepted it as the basis for its decree. But as a statement of the *material facts* upon which a decision of the issues raised by the pleadings must be based it was fatally defective. It could not be determined therefrom whether the lease was *valid or void*, but instead the court, by consent of the parties to the agreement, assumed to ratify and confirm it, regardless of its validity, merely because it might be to the best interest of Barnett. If the court concluded seuh agreement, without more, was sufficient to support a decree purporting to ratify and confirm even a void lease, the error was *more than one of judgment*. It extended to the attempted exercise of a jurisdiction it *did not have*, for it was

in violation of the express statute prescribing the only method for alienation of restricted land. (See foot-note 1 page 4 of petition.)

Part of the quoted portion of the trial court's opinion (respondents' brief, p. 14) confirms the conclusion the informal inquiry of the Court related to the advisability of a settlement of Barnett's claims by a consent decree, and *without a trial.* The statement made—that on the submission of the compromise agreement to Judge KENNAMER, it was stated:

> "* * * that the compromise would be to the best interest of Jackson Barnett,"

and that the Court then,

> "* * * after hearing evidence therein as to whether the compromise agreement was to the best interest of Barnett,"

clearly defines the limits of the only inquiry undertaken by the Court. The matter inquired about was not an issue, and, as far as the power of the Court extended, it was wholly immaterial whether a settlement by an unauthorized compromise was, or was not, for the best interests of Barnett. How any court could ever reach a conclusion that it was "to the best interest of the incompetent" to strip him of most all of his wealth, and transfer to others, is beyond a rational mind.

It was the definite and only purpose of the agreement, to *eliminate* all questions touching the execution of the lease, the mental competency of Barnett, and the capacity of a spurious guardian to act in his behalf, as well as the settled principle of law, that only a guardian, legally qualified, could execute a valid lease. The plan was designed to prevent inquiry into any of these issues, by an agree-

ment of parties without lawful authority to bind the incompetent. The attempt to effectuate that end was *beyond the jurisdiction of the Court.* The United States was cognizant of the weakness of the effort to, by judicial fiat, give validity to a void lease, by merely consenting to a confirmation of it. Its view is expressed in the letter of Mr. Stivers (R. 746, 747) who, among other things, advised the Attorney General that:

> "Since the failure of consideration is not an issue in this case, I am unable to understand how the payment of $35,000.00 can make a void lease valid."

The whole controversy here depends upon whether or not the decree in Consolidated Cause No. 216-Equity is, or is not, a *consent* decree. If this Court finds that it is, this should be the end of the matter, so far as petitioner's right to the writ goes. If it is a consent decree, then the Court below erred in finding it was *res adjudicata*, and its decision is in direct conflict with the established rule, repeatedly announced by both the state and lower federal courts, and by this Court. Respondents have sought to confuse the issue by the suggestion the Court in Consolidated Cause No. 216-Equity must have entered upon a needless investigation to determine facts and issues, the parties themselves were studiously attempting to avoid. If the Court had the power it assumed, to, by a consent decree, give effect to the attempted ratification and confirmation of an oil and gas lease, regardless of its validity, and the sole object of the compromise settlement was to induce it to do so, then no judicial determination of the issues upon which the concolidated suits were brought was necessary. And none was had. On this we say the record is conclusive. (See authorities, foot-notes 11 to 16, pages 22 to 36 of petition.)

We have no fault to find with the argument, as an abstract proposition made by respondents (pp. 24-25) supporting the rule laid down in *Pope* v. *United States*, No. 26, decided November 6, 1944—that the entry of a "consent decree" is a judicial act. But, as a prerequisite to a valid "judicial act" of that character, it must be preceded by and grounded upon a *binding consent* of the parties. The case does not hold that a decree entered without such consent is a valid "judicial act." That is the real question involved here.

Respondents studiously seek to evade the issue. They base their argument on the bald assumption, a valid and binding compromise agreement constituting the sole basis for the "consent decree" had been entered into. Their uncertainty as to which of the divers named so-called "representatives of this incompetent, restricted Indian," had authority to act in his behalf, in entering into the attempted compromise, is evidenced by the fact they do not elect as between the next friend, guardian *ad litem*, or the "two probate guardians." Cases already noticed in petitioner's application for the writ eliminate the guardian *ad litem* and next friend, and the fact that "two probate guardians" were enlisted, when, in any event, only one could have acted, is convincing that neither was qualified. (See petition, pp. 30-31-32.) Under the settled law controlling in cases of this character, not even a *qualified* guardian can alienate his ward's estate, without the express approval of the court having jurisdiction of it. Neither of the courts by which the "two probate" guardians referred to were appointed, had jurisdiction of the estate of Jackson Barnett. The purported appointments of such guardians were *spurious*, and the

record is convincing, their appointments were procured in aid of the effort to foist a simulated "compromise agreement" upon the court from which the "consent decrees" were sought.

In advancing the Attroney General and Secretary of the Interior, as official agencies clothed with authority to act for an incompetent, restricted Indian, in negotiating a valid compromise agreement, divesting him of his estate, they drive, in the face of the concession of Judge HUXMAN in the opinion of the lower court, quoted at page 9 of their brief, that it was error on the part of the trial court to find and hold that the approval of either or both of them gave validity to the unauthorized compromise agreement. The statement that jurisdiction of the parties and the subject-matter "includes power to determine with binding effect every justiciable issue involved," carries with it the duty of the court to exercise such jurisdiction "to determine" the issues according to law.

The attempted substitution of an invalid compromise for the judicial investigation essential to a determination thereof, and the entry of a "consent decree," based on such compromise, is not merely an error in the way such issues are determined, but is the attempted exercise of a jurisdiction *beyond the power of the court to exercise*. And only a correct statement of the proposition is required to bring us back to the real question presented by the petition for the writ. In their argument (p. 10 of brief) respondents would reverse the process by which the court was induced to enter its "consent decree." Instead of such consent being "super-added" to an adjudication already made by the court upon and after proper judicial inquiry, the consent relied upon, evidenced by the compromise agreement

here, not only *preceded* any attempt by the court to investigate and adjudicate the matters before it, but such compromise was adopted as an all embracing *substitute* for such judicial action. The existence of this fact destroys the basis for the argument advanced by respondents.

The rule followed in the cases of *Mars, et al.*, v. *McDougal, et al.*, 40 F. (2d) 247; *Conner, et al.*, v. *Cornell, et al.*, 32 F. (2d) 581, and the others cited at pages 27 to 29 of respondents' brief, *has no application here.* In each of those cases where control of the litigation was exercised by the United States, the litigation was either instituted by it in its own right, or its intervention therein was *on behalf* of its Indian ward. It was in good faith attempting to perform duties incident to its assumed guardianship of its ward. In the litigation in which the consent decrees were entered, while it ostensibly assumed the position of guardian, it proceeded as an adversary, resisting the claims of its ward. For all purposes, it was as actively a defendant as any of the parties against whom Jackson Barnett was asserting an adverse right, and with less justification. Unless the United States was ready to assume the obligations incident to the guardianship, it had no business in the litigation. It owed no duty to the adversary defendants of Barnett. In its answer in that litigation (R. . .) it set up matters which, if established, would have required a decree supporting the claims of Barnett. But instead of demanding such relief, it attempted to rest upon other grounds advanced, to defeat his claims, and prayed for the same relief as that asked by the other adversaries of Barnett.

To argue that the United States, under feigned claim of guardianship, may enter litigation which its incompetent Indian ward has an unqualified legal right to maintain,

on his own account, and therein seek to *defeat* his claimed right, and then take advantage of the position it has wrongfully assumed, and dismiss with prejudice a suit brought in the first instance by its ward, is as unwarranted as it is vicious and unconscionable. To sustain such a theory, would operate to effectively deprive an incompetent, restricted Indian of his constitutional right to protect his individual personal or property rights in court. It may be conceded that a dismissal with prejudice by a party having authority to act, renders the judgment *res adjudicata*, but this is far from conceding that one appearing in the litigation as an adversary of another for the expressed purpose of defeating an independent suit initiated by him, may dismiss the other's suit with prejudice. To urge such doctrine seriously is as unthinkable as it is unconscionable. A guardian if, for reasons which satisfied it, is unwilling to asssit its ward in litigation, should at least decline to interfere with the prosecution of it by its ward. Not to do so, is a flagrant violation of fair play and the rights of its ward, and the statutory duty of such guradian. We are unwilling to believe this or any other court will approve and sanction the effort of a guardian, and particularly a self-constituted one like the United States, in its relation to a helpless incompetent Indian ward, to enter litigation properly instituted by, or on behalf of, its ward, for the sole purpose of defeating it, to promote the interests of his adversaries.

In no other case involving Indians of the Five Tribes, or any other Indians, has the Government taken such position. The position, as well as the unwarranted acts of the United States, in attempting to defeat the claims of Barnett, advanced in Consolidated Cause No. 216-Equity, clearly distinguished this case from all of the cases cited by respondents, in support of the binding effect of the effort of

the United States to dismiss with prejudice, the suits brought on behalf of Jackson Barnett.

The statement of counsel (respondents' brief, p. 27) that

> "Consequently, the District Court, had it seen fit to do so, could have made and entered the judgments and decrees under attack, merely and solely upon the approval and execution of the compromise agreement herein, by the United States, acting through its Secretary of the Interior and its Attorney General and without any judicial ascertainment or determination whatsoever,"

squarely presents the issue, and the only issue before the court on petitioner's application for *certiorari*. The interpolation of the words, "had it seen fit to do so" was needless, for the record here is conclusive the court did see fit to enter the consent decrees, solely upon the approvals of the Attorney General and the Secretary of the Interior of the compromise agreement, for, after approving that agreement, it did nothing more than withhold entry of its decrees until this approval by said officials was secured. These decrees had been prepared and were submitted to the court at the same time it approved the compromise agreement. Apparently uncertain of its jurisdiction to then enter its decrees, or of the propriety of doing so, it asked for approval of its proposed action by the Attorney General and the Secretary of the Interior. To say that their approval extended the court's jurisdiction to enter its consent decrees, grounded upon the compromise agreement, is opposed to the settled rule followed consistently by this Court, the inferior federal courts and the Supreme Court of Oklahoma, and with which, petitioner claims, the decision of the Circuit Court of Appeals here is in direct conflict.

Maxwell Land Grant Case.

Commencing on page 21 of respondents' brief, they present as authority for the exercise by the District Court, in Consolidated Cause No. 216-Equity, of jurisdiction to enter the consent judgment in that cause, the case of *Thompson, Adm'r,* v. *Maxwell Land Grant & Ry. Co.*, 168 U. S. 451, 42 L. ed. 539, and quote at some length from said decision.

We submit, at the outset, in answer to such contention, that said decision does not in any wise determine the question here presented and is not authority for the decision rendered in this case, dealing with the property of a full-blood, restricted and mentally incompetent member of the Creek Nation of Indians, and in effect, divesting said Indian of the title and ownership of property of great value, contrary to the plain provisions of the laws of Congress, fixing and determining the manner and method by and through which such properties may be so divested and transferred to others.

The facts involved are set forth clearly and fully in the opinion of Mr. Justice Brewer, of this Court. The recitals in the opinion, in substance, are as follows:

The litigation involved in that matter was, in the final decision of the Supreme Court, upon the question of the rights of three minor children of one Alfred Bent, who was, in previous litigation and during his life, adjudged to be the owner, under a parol agreement, of an undivided one-fourth interest in the lands involved, as an heir of the original patentee, and that Maxwell purchased all of the outstanding interest of the heirs of the patentee in the Spanish Grant.

Negotiations to purchase the interests of Charles Bent, at the time the other heirs conveyed, were not fully consummated, but had reached the point where Maxwell had offered $18,000.00, and Bent had asked $21,000.00, and that a deed was prepared for the signature of Bent and the other heirs, upon that basis. Bent delayed for a few days the execution of the deed to him, on the belief that Maxwell would pay more than the $18,000.00. The decision reflects that Bent intended to finally consummate the deal on those figures, if necessary; but, before the deed was finally delivered, Bent died suddenly; that before his death, Bent had executed, in due form, a will, under the terms of which he transferred to his widow all of his property, both real and personal, including these lands; that a clause provided that the widow should use the property and proceeds for the joint use of herself and the three children.

Mr. Justice BREWER, in his opinion, states that the title to *all* of said property had passed to the widow, under the terms of the will, and that she had full power and authority to convey the property to others, which was binding upon the minors; and that, subsequent to the death of Bent, the widow consummated the contract with Maxwell, and conveyed by deed to Maxwell, as the widow of Charles Bent.

The opinion further states that all of the facts, oral and written, constituting the history of and rights of Charles Bent, in the lands, *were heard upon a trial;* and that, upon the death of Bent, the widow was appointed as guardian *ad litem* to represent the interests of the minors, and herself made a party to the suit. She was also named in said cause as Commissioner in Chancery, with full powers and authority, under the orders of the Court, to convey the interests formerly owned by Charles Bent in all the lands

claimed by Maxwell, under the terms of the purchase, and the deed thereon, executed by the widow, as above stated, and that the consideration was fair. The opinion also cites that the testimony indicates that the Charles Bent interests brought to the widow and children more than the other adlut competent heirs received for their interests, and that the husbands of the other heirs were intelligent business men and capable of protecting the interests of their wives in such transaction.

The opinion recites also that the minor children had no right or title to said property, and that, under said will, the widow was authorized to exercise her own discretion in all matters pertaining to the intersets of the children, under the terms of the will.

How could such a decision be applicable in this case, as an authority for these so-called representatives of Barnett to enter a consent decree, the effect of which was to take away from Barnett, an incompetent, that which, under the pleadings, constituted almost his entire property, and give nothing in return, and transfer it over to parties who had fraudulently and unlawfully gained possession of the property, in violation of the laws of Congress, and had no title or right therein, upon the undisputed facts?

The citation by respondents of decisions of the State of Massachusetts touching the authority and jurisdiction of the courts of that state, under local law, to deal with the rights of infants and their property, certainly have no force or effect in supporting the entering of the consent decrees involved here, and it is needless for petitioner to take further time or space to discuss those decisions.

The contention made (respondents' brief, pp. 19-21) that a court may in any case where an incompetent person's

property is involved, enter a decree which to the court appears *to the best interest* of the incompetent owner, when parties legally empowered to represent him have consented to such decree, presents a state of facts not present here. The settled law controlling in this and every other case where the restricted property of an incompetent Indian ward of the Government is involved, is that it is a legal impossibility for any person or agency, administrative or judicial, to enter into or by approval of any compromise agreement, made in settlement of pending litigation, divest such owner of his property or any interest therein. Where such owner is an incompetent, only his duly appointed guradian can initiate or complete any transaction which operates as a conveyance or incumbrance of his ward's estate, and then only with the approval of the County Court having jurisdiction of the estate. No other court, state or federal, is clothed with such authority. This proposition is covered in the original petition and brief of petitioner supporting application for the writ. (pp. 17-19, 30-31)

The argument that

> "All that is required is that the court, for itself, determine whether a judgment agreed to is, reasonable and proper and for the best interest of the minor or mentally incompetent person"

proceeds upon the assumption the decrees here were "agreed to," an assumption without foundation where it appears that there was no qualified guardian having authority to enter into such agreement, and where under all the decisions yet written, the authority of any other person or court to enter consent for the incompetent, has been flatly denied. This proposition is the pivotal and controlling one in the matter now before the court.

Respondents advance the proposition (brief, pp. 15-16) that as the trial court and the Circuit Court of Appeals have concurred in finding and holding that the judgments or decrees under attack were not "consent decrees," and were, therefore *res adjudicata,* thus:

> "This dual finding and holding sweeps out from under petitioner the whole and entire *factual* foundation (italics added) upon which, in its final analyses, is predicated his petition for *certiorari.*"

In all the cases cited by respondents, the court was dealing with questions of "fact," and they err in assuming that the concurrent findings in Consolidated Cause 216-Equity, were upon questions of fact. The concurrence here was purely and solely upon a conclusion of law—that the decrees in that case were *res adjudicata,* and the rule which respondents here attempt to invoke has no application.

We again remind the court that there was no fact whatsoever presented to the court, upon any issue involved in the litigation in Consolidated Cause No. 216-Equity, but that the decree entered therein was solely and purely upon the compromise esttlement agreement.

The repeated assertion in respondents' brief that there were justiciable facts presented to, or considered by, the trial court, as an element of his decision or decree therein, is completely refuted by the record, and we now, in addition to what has been said with reference to the recitals of the compromise agreement and the decree, and for the convenient reference of the court, refer to a brief statement of the testimony of John M. Goldesberry, district attorney, James B. Diggs and R. H. Wills, attorneys for respondents, attached hereto as an *Appendix,* and ask the Court to care-

fully read the same, if there is any question in their minds about what was done and said on the occasion of the approval of the compromise agreement and the entry of the decree.

Conclusion.

We feel we have, as briefly as possible, called attention to the unjustified claims of respondents, and have strengthened, if that were possible, the clear and undoubted sufficiency of the plaintiff's petition, and the brief therein attached, to justify this Court in immediately granting a writ, as therein prayed.

Respectfully submitted,

CHAS. B. ROGERS,
Attorney for Petitioner.

Of Counsel:
JOSEPHUS C. TRIMBLE,
HARRY S. HALL.

APPENDIX.

Statements of Judge Diggs and Mr. John M. Goldesberry and Wills as to what was done at the hearings on the application for approval of compromise agreement and entry of decree.

Mr. Wills, counsel for Mid-Continent Petroleum Corporation (R. 670-671):

> "* * * I think I know exactly what took place. As I recall, there was no witness called, and sworn as to whether—as to the desirability of this agreement. That is my recollection. That the only oral statement made was that by Judge Stuart, the guardian *ad litem;* and then Judge Kennamer turned around and asked me the question if we agreed, and by inclination of his head, to the other attorneys, impliedly asked the same question, and they agreed. Now that is according to my recollection as to what actually took place."

John M. Goldesberry sworn as witness testified (R. 672):

He is United States District Attorney handling the Government's interest in the litigation.

He was to some extent familiar with the litigation but Mr. Louis Stivers his assistant "principally and primarily" handled the Government's representation.

He was present when the final decree was entered.

First learned of the case being taken up for the entering of the decree—the same morning.

Recalls that Judge Diggs, Mr. Schwabe, Judge Stuart, guardian *ad litem*, were there, and believes Mr. Wills was there.

There was no witness sworn to testify, or examined.

A. As I recall it, about what happened was, just about what Judge Diggs stated there a while ago.

Q. (By Mr. Rogers:) Just agreed on entering the decree?

A. That is my best judgment about it.

Again:

A. There was no oral testimony introduced in evidence, and what documentary evidence, if any, has been submitted to Judge Kennamer, prior to that time, I am not in position to say.

Q. It was a 'consent decree'?

A. That was my recollection.

STATEMENT OF JUDGE DIGGS, UNDER OATH.

Was present when Judge Kennamer signed the final decree on July 11th, 1929. (R. 679)

Mr. George S. Ramsey was present; Judge Stuart was present. (R. 679)

Mr. Denton or Mr. Wills; and Mr. George Schwabe; and some other attorney he did not know.

On July 11th, the day of the filing or making of the final decree the quadruplicate copy of the final decree was presented in open court, together with the letter of approval of the Acting Secretary, Mr. Dixon—and also the letter from the Department of Justice, indicating approval. (R. 679)

Q. (By Mr. Wills:) All right, now, on July 11th, 1929, do you recall any other document being presented to Judge Kennamer?

A. A motion for compromise—I may get a little broader than the question is—if the court please—the motion for compromise was presented by Judge Stuart; attached to it was the appointment of two of these guardians. (R. 679)

Q. And what guardians do you refer to? Mr. Hall?

A. Appointed by Okmulgee County Court——

Q. And Hall?

A. And J. Riley Hall. (R. 680)

Q. I see—I understand.

A. When Judge Stuart presented the application, the court in substance remarked to Judge Stuart: 'Should this be approved, or do you agree to it?' Judge Stuart replied, in substance, this: 'I think it is doubtful whether the defendants could recover, but under all the circumstances, I think the agreement should be approved.' As near as I can recollect, that was his exact words. (R. 680)

Q. Now, do you recall any further statement of Judge Stuart?

A. At that time, I do not.

Q. (By Mr. Wills:) What statement, Judge Stuart, and the other parties, Judge Ramsey, and yourself, or anyone else made there, immediately preceding the signing of the decree? (R. 682)

A. As I recall, Mr. MacMullen sent me the original of the compromise agreement, with the approvals of the Department and Judge Kennamer thereon. I presented this to Judge Kennamer, in open court. I think on the same date, I delivered to the clerk of the court the check for $35,000.00 that had been —was to be—the consideration. (R. 682)

By the Court: The specific question was, What statement, if any, did Judge Stuart make on that occasion.

A. I don't believe he made any specific statement.

Q. (By Mr. Wills:) Well, what about you, did you make any specific statement on that occasion, other than presenting these things, showing the approval of the Department and the approval of the different guardians that were to approve it? (R. 682)

A. Other than presenting these things, showing the approval of the Department and the approval of the different guardians that were to approve it.

Q. Do you remember whether Judge Kennamer asked

any questions of any parties that were interested in the matter? (R. 682)

A. That is one point that I am not certain. He asked a question, but whether it was July 11th, or June 13th, I cannot recall. He asked Judge Stuart the question that I have before stated here, with Judge Stuart's answer. He looked at me and asked if I agreed. I either said 'yes,' or gave an assent; he then looked to the other attorneys with a look of inquiry, but did not direct any specific question to them, and they all gave assent. That is what, I think, took place. (R. 682-683)

Being asked if anything else occurred on July 11th, witness answered (R. 683):

A. I think I have given you substantially the transaction; at least I have endeavored to do so.

Now, with reference to the session on June 13th, the witness was asked: What (R. 683) if any statements were made on that occasion, by anybody? The witness answered:

A. None, except what I have related. (R. 683)

The Court's attention is called to the fact that the statement made by Judge Stuart, as detailed by Judge Diggs, was on June 13th, when he made application for the approval of the compromise agreement, and not on July 11th, when the decree was signed.